MODEL JURY CHARGES
CRIMINAL

NEW JERSEY
SUPREME COURT COMMITTEE ON
MODEL JURY CHARGES, CRIMINAL

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SEE SEPARATE VOLUME FOR PENAL
CODE MODEL JURY CHARGES)

INTRODUCTION

This set of model jury charges for use in criminal cases replaces the 1969 revision and its yearly supplements of 1970 - 1972. The charges in this book were prepared, or revised, and adopted by the Supreme Court Committee on Model Jury Charges, Criminal. They have not been reviewed or approved by the Supreme Court.

As a general word of caution, the Committee would like to point out that these charges are intended for use as guides only. They are not considered to be capable of universal application. The complexities of each case will mandate close examination of the relevance and propriety of individual sections of most model charges. As a further precaution, you are urged to stay abreast of the changes in our decisional criminal law in order to make such modifications in the model charges as may become necessary.

It is hoped that you will find this set of charges to be of distinct value in your charge preparation. Should you have any suggestions or comments regarding these charges or charges not presently included in the model set, please send them to the Administrative Director of the Courts. All comments and suggestions will be then forwarded to the Committee for its consideration.

The members of the New Jersey Supreme Court Committee on Model Jury Charges, Criminal for the 1977 - 1978 court term are:

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1.100 BASIC CRIMINAL CHARGE - SHORT FORM

MR. FOREMAN AND MEMBERS OF THE JURY:

The defendant (s) stands before you on an indictment found by the Grand Jury charging him (or them) with _____.

The indictment is no evidence of the guilt of the defendant (s) but merely a formal charge, an informative pleading evidencing a step in the proceedings to bring the matter before a court and jury such as this for final disposition as to the question of whether the defendant (s) is to be found guilty or not guilty.

1.101 FUNCTION OF COURT AND JURY

In the trial of the case the function of the court is to instruct the jury with respect to the principles of law governing the case and the jury is required to accept and be controlled by the law as stated by the court.

On the other hand, you are the sole judges of the facts, the weight of the testimony, the credibility of the witnesses, the inferences to be drawn from the testimony, and the ultimate conclusions to be reached upon all the facts.

It is, however, proper for the Judge to comment on the evidence or parts of the evidence, but you will understand and remember that the comments of the court on the evidence are not binding in any sense on the jury, because it is the exclusive function of the jury to decide the facts. You will understand also that the Judge does not and cannot undertake to say what the evidence is or is not, but can only state his recollection of it. This recollection is not to be

accepted by the jury, but is to be disregarded, except where it coincides with their recollection. The same thing is true with respect to the comments of counsel during summation. Their comments on the facts represent only their recollection of the testimony. If it does not agree with your recollection, you are under duty to disregard it and rely exclusively on your own recollection.

During this trial, motions and objections have necessarily been made by both the State and the defendant. However, you are bound by the rulings of the Court, and any evidence excluded by the Court must not be considered by you in your deliberations. The actions and rulings of the Court should not in any way be taken by you as indicating how the Court may feel this case should be decided. Trial procedural matters are the responsibility of the Court as the sole judge of the law.

I charge you that the fact that the Court saw fit in some instances to direct questions to certain of the witnesses in the case must not influence you in any way in your deliberations. The fact that the Court saw fit to direct such questions does not indicate any opinion of the Court one way or the other as to the testimony given by such witnesses. The credit and belief for the defense, must be determined by you and by you alone. Any remarks made by the Court to counsel, or counsel to the Court, or between counsel, are not evidence and should not affect or have any part in your deliberations.

1.102 PRESUMPTION OF INNOCENCE

This defendant(s), as are all defendants in criminal cases, is presumed to be innocent until proven guilty beyond a reasonable doubt. That presumption continues throughout the whole trial of the case and even during your deliberations unless and until you have determined that the State has proven his guilt beyond a reasonable doubt.

1.103 BURDEN OF PROOF

The burden of proof is on the State, and it never shifts; it remains on the State throughout the whole trial of the case. No burden with respect to proof is imposed on the defendant. He is not obliged to prove his innocence. Unless the State has proved the crime charged and each of its elements beyond a reasonable doubt, the defendant is entitled to an acquittal. (Please note that the defendant is required to establish the defenses of insanity and duress by a preponderance of the evidence. State v. Tascano, 74 N.J. 421 (1977); State v. DiPaglia, 64 N.J. 288 (1974).)

1.104 REASONABLE DOUBT

Reasonable doubt is not a mere possible or imaginary doubt, because, as you may well know, everything relating to human affairs or depending upon oral evidence is open to some possible or imaginary doubt. A reasonable doubt is an honest and reasonable uncertainty as to the guilt of the defendant existing in your minds after you have given full and impartial consideration to all of the evidence. It may arise from the evidence itself or from a lack of evidence.

The indictment reads in pertinent part as follows:

(Read indictment)

The pertinent part of the statute on which this indictment is based reads as follows:

(Read statute)

(Describe substantive law pertinent to statute, including definitions)

(Charge elements of the crime involved)

(Discuss law pertinent to defenses)

(Comment on facts, if desirable)

(Requests to charge, if granted, should be incorporated in the main charge)

Since this is a criminal case, your verdict must be unanimous; all twelve jurors deliberating must agree. You should decide the case on the evidence without any bias, prejudice or sympathy and without reference to any suspicion or conjecture.

(Set forth possible verdicts)

(Hear objections to charge in open court and out of presence of jury. State rulings on requests to charge on record)

(Select twelve jurors if more than twelve have been chosen)

(Swear officers)

Note:

If it is proposed to submit the indictment to the jury, see the precautions to be observed as delineated in State v. Begyn, 58 N.J. Super., 185, 195 (App. Div. 1959).

Approved: 1/29/75

2.050 . ABDUCTION

Ladies and gentlemen, the defendant has been charged with the crime of abduction pursuant to N.J.S.A. 2A:86-2 which provides:

> "Any person who takes or detains a female against her will, with intent to compel her by force, threats, persuasion, menace or duress, to marry him or to marry any other person, or to be defined, is guilty of a ... [crime].

In order to sustain its burden of proof the State must prove each and every one of the following elements beyond a reasonable doubt:

1. there must be a taking or a detaining of the female, and
2. such taking or detaining must be against her will; and
3. the defendant at the time of the taking or detention must be shown to have had the intent to compel her by force, threats, pursuasion, menace or duress to marry him or to marry any other person; or, the defendant must be shown to have had the intent to defile or or the intent that she should be defiled by another.

What does each element mean?

To constitute a taking no force, actual or constructive, need be exercised. The taking may be effected by pursuasion, enticement, or inducement. And it is not necessary that the victim be taken from the control or against the will of those having lawful authority over her. However, the State must prove conduct by the defendant indicating a control, complete or partial, of her person.

By detaining is meant to check, to delay, to hinder, to hold, to keep in custody, to retard, to restrain from proceeding, to stay, to stop. A detention occurs when by any means the defendant interferes with the free locomotion on the part of the female, even for a very brief period of time.

Either a taking or detaining constitute the first element.

The second element is that such taking or detaining be against the will of the female. This element can be defined as a lack of consent on the part of the female.

Consent, however reluctant, negates this offense. If a woman taken or detained is physically and

mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the taking or detaining. This resistance must be by acts and not by mere words, and must be reasonably proportionate to the victim's strength and opportunity. It must be in good faith and without pretense, with an active determination to prevent the taking or detaining of her person, and must not be merely passive and perfunctory. However, the fact that a victim finally submits does not necessarily imply that she consented. Submission to a compelling force, or as a result of being put in fear, is not consent. Resistance is necessarily relative. It is only required that the female resist as much as she possibly can under the circumstances, and the circumstances and conditions surrounding the parties at the time of the alleged offense are to be considered in determining whether adequate resistance was offered.

The third element is the intent of the defendant at the time of the alleged taking or detaining.

(INSERT INTENT CHARGE)

To be guilty of this offense, the intent of the defendant must be such that he intended by the use of force, threats, persuasion, menace or duress to compel the female to marry himself or another or that he intended that the female be defiled by himself or another.

Where a person takes or detains a female for a prohibited purpose against her will, his failure or inability to consummate such purpose, while relevant on the question of his intent does not relieve him of responsibility.

The allegation of force is established by evidence showing that her resistance was overcome by physical force, or that her will was overcome by fear.

Defile means the commission of acts, such as touching which tend to debauch, deflower, or corrupt the chastity of a woman.

Debauchery means sexual immorality or excesses. Such corruption occurs if defendant's acts are motivated solely by lust that forces or induces the woman to lower her moral principles.

The offense of abduction is complete if the female is taken or detained for any one of the above

prohibited purposes, even though the statute prohibits a taking or detaining of a female for several different purposes.

In conclusion, I charge you that in determining whether or not the crime has been proven you will ask yourself whether the State has proven beyond a reasonable doubt each of these three elements namely:

1. A taking or detention;
2. That said taking or detention was against the will of the female;
3. The intent on the part of the defendant to compel the female by force, threats, persuasion, menace or duress to marry him or any other person or to defile the female or in order that she should be defiled by another.

See also:

1. 1 C.J.S. Abduction §§ 1-35 (1936)
2. Black's Law Dictionary 17 (4th ed. 1968)
3. 1 Am. Jur. 2d Abduction and Kidnapping §§ 1-35 (1962)
4. As to consent element see State v. Terry, 89 N.J. Super. 445, 449-450 (App. Div. 1965)
5. As to the coexistence of abduction and kidnapping statutes see State v. Gibbs, 79 N.J. Super. 315 (App. Div. 1963)

Approved: 9/1/76

2.051 ARMED

(THIS CHARGE MAY BE USED WHEN DEFENDANT IS CHARGED WITH COMMITTING ANY CRIME WHILE ARMED.)

In addition to being charged under Count _____ of this indictment with the alleged crime of _____, defendant, in addition, is charged with committing said crime of _____ while armed with a _____.

This charge is based upon N.J.S.A. 2A:151-5 which, in pertinent part, provides in effect as follows:

> "Any person who commits or attempts to commit the crime of _____* (or who is a fugitive from justice) when armed with or having in his possession *(any firearm, whether or not capable of being discharged) or* (dangerous instrument of any kind usually known as _____) or *(any object or device, whether toy or imitation, having an appearance similar to or capable of being mistaken for any of the foregoing) shall, in addition to the punishment provided for the crime of _____, be punished additionally by the court upon conviction."
>
> *Use applicable parenthetical clause.

Consequently, when reaching your verdict as to the defendant's guilt or innocence of the charge of being armed, you must first decide under Count ____ of this indictment whether the State has proved beyond a reasonable doubt that defendant committed the crime of _____, and if you find the crime of _____ was committed by him, you must further decide whether the State has proved beyond a reasonable doubt that he was armed at that time with a _____ (within the meaning of the statute) as alleged in this count of the indictment.

If you determine in your deliberations that the State has not proven the defendant guilty of the crime of _____ beyond a reasonable doubt, then your verdict is to be one of not guilty of the crime of _____ as alleged in this count. Then it naturally follows that such verdict of not guilty applies to the charge of being armed. For, if the defendant is not guilty of _____, it follows he cannot be guilty of _____ while armed.

NOTE: It is advisable that there be a separate charge and a separate verdict as to being armed although being armed is not a separate offense but an additional sentence.

Cf. State v. Robert Morgan, 121 N.J. Super. 217 (App. Div. 1972)

State v. Roger M. LaVera, 35 N.J. Super. 256 (App. Div. 1955)

Approved: 10/25/77

2.100 ARSON

(N.J.S.A. 2A:89-1)

The State accuses the defendant of the crime of unlawfully burning a dwelling house (or consenting to the burning of a dwelling house).

The statute on which this indictment is based reads as follows:

> "Any person who willfully or maliciously burns or consents to the burning of a dwelling house, whether it be his own or that of another, or a structure that is a part of or belongs to or adjoins such dwelling house, or any other building by means whereof a dwelling house shall be burnt, whether it be his own or that of another, is guilty of...(a crime)." N.J.S.A. 2A:89-1.

You will note that the statute refers to a person who acts willfully or maliciously. Willfully means voluntarily, knowingly and intentionally. Maliciously means wrongfully, intentionally and without justification or excuse. Thus, if the burning were merely the result of negligence there would not be enough evidence of guilt. The burning must be the result of willful or malicious conduct.

To find the defendant guilty the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about the_____ day of _____, 19_____, in the County of_____, New Jersey, the defendant did burn the dwelling house (or consented to the burning of a dwelling house).

2. That the same was done willfully or maliciously with intent to burn.

(GIVE MODEL CHARGE ON INTENT 4.181) *

There can be no finding of guilty unless a dwelling house was actually burned, but the extent of the damage resulting from the burning is immaterial. If any part of a dwelling house, however small, is consumed it is sufficient. A structure is not considered burned within the meaning of the law relating to arson when it is merely scorched or smoked or discolored by heat. The offense is committed if, as a result of burning any part of the structure is charred, or if the fiber or texture of the wood is altered or destroyed.[1] With regard to wood, charring means reducing wood to charcoal by burning. Under no circumstances, however, can the burning of personal property be

regarded as arson.[2] Personal property could include items like rugs, books, tables or curtains. Arson involves the burning of the actual building or structure and no crime is committed under this statute if only personal property inside the building is burned.

NOTE: This charge relates to common law arson. However, there are several other statutes dealing with other burnings.

See N.J.S.A. 2A:89-2, 2A:89-3, 2A:89-4, 2A:89-5 and 2A:89-6.

1. State v. Schenk, 100 N.J. Super. 122 (App. Div. 1968).

2. Id.

* State v. Kinlaw, 150 N.J. Super. 70 (App. Div. 1977), should be considered if the issue of specific intent is raised.

2.101 ASSAULT AND BATTERY UPON LAW ENFORCEMENT OFFICER IN PERFORMANCE OF DUTIES (N.J.S.A. 2A:90-4) AND PHYSICAL RESISTANCE BY AN OFFENDER TO AN ARREST (N.J.S.A. 2A:85-1)

This indictment charges the defendant with having violated the provisions of New Jersey Statutes 2A:90-4 and thereby with having committed the crime of assault and battery upon a law enforcement officer acting in the performance of his duties. The pertinent part of this statute reads as follows:

(HERE READ APPLICABLE PART OF STATUTE BELOW. THAT PART APPLICABLE IN MOST CASES IS UNDERLINED)

"Any person who commits an assault and battery upon:

(a) Any state, county of municipal police officer, or any public school law enforcement officer, or any other law enforcement officer, acting in the performance of his duties while in uniform or exhibiting evidence of his authority; or

(b) Any paid or volunteer fireman acting in the performance of his duties while in uniform, or while riding in or upon a fire engine, hook and ladder truck or other fire-fighting apparatus or equipment, or while actively engaged in abating or quelling a fire, or while otherwise clearly identifiable as being engaged in the performance of the duties of a fireman; or

(c) Any member of an ambulance, rescue, first-aid or emergency squad or corps; or any physician, nurse, medical assistant, or employee of a hospital, clinic, or ambulance service; acting in the performance of his duties while in uniform; or while wearing an armband or other clearly visible identification indicating his status as a person engaged in emergency, first-aid, or medical services; or while riding in or upon, or entering or leaving, any clearly identifiable ambulance or other emergency vehicle- is guilty of " (a crime).

In every criminal case the burden is on the State to prove all of the essential elements of the crime charged to your satisfaction beyond a reasonable doubt. In this case there are three such essential elements which must be so proved by the State before you may find the defendant guilty. They are:

First: That the defendant in fact committed an assault and battery. An assault is an attempt or offer with unlawful force or violence to do intentionally a bodily hurt or physical injury to another. A battery is the actual doing of any bodily hurt or physical injury to another. No particular degree of force or violence or injury is necessary to constitute an assault or battery, and, therefore the slightest touching or striking the body of another person against his will is sufficient.

Second: That the defendant intended to commit the assault and battery. Intent, you must realize, is a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing.

However, it is not necessary, members of the jury, that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all the surrounding circumstances.

Third: That the assault and battery was committed upon a state, county or municipal police officer or other law enforcement officer.

Fourth: That the said law enforcement officer was the victim of an assault and battery while either:

(a) Acting in the performance of his duties while in uniform, or

(b) Acting in the performance of his duties while exhibiting evidence of his authority.

(NOTE: IF A DIFFERENT TYPE OF LAW ENFORCEMENT OFFICER IS INVOLVED THAN ONE COVERED BY THE UNDERLINED PORTION OF THE STATUTE ABOVE, THEN SUBSTITUTE THE APPLICABLE LANGUAGE FROM THE STATUTE IN THE SECOND AND THIRD ESSENTIAL ELEMENTS ABOVE.)

If you find that any of these three essential elements of this crime has not been proved by the State beyond a reasonable doubt, it is your duty to return a verdict of not guilty. However, if you are satisfied beyond a reasonable doubt that the defendant did violate the statute and all the elements thereof, you must find the defendant guilty.

The defendant also is charged with resisting arrest under New Jersey Statute 2A:85-1.

To constitute a violation of this statute, the State has the burden of proving beyond a reasonable doubt that the defendant knew or should have known that an attempt was being made to arrest him and that the defendant actively resisted such an attempt. The first essential element of this offense is that you must find beyond a reasonable

doubt that the police officer was in the course of or had placed the defendant under arrest, which was known by the defendant or should have been known by him at the time. Arrest is defined as the depriving of a person of his liberty by legal authority or the seizing of a person and detaining him in the custody of the law. It includes not only the initial apprehension of the person but any subsequent detention in order to assure that he be present to answer an alleged charge against him.

The second necessary element that must be proved by the State beyond a reasonable doubt is that the defendant resisted arrest. Resisting arrest is defined as the use of physical force or the threat of use of physical force to prevent an arrest. It is something more than the mere use of words.

The final necessary element of the offense which must be proved by the State beyond a reasonable doubt is that the defendant intended to resist arrest. You will recall that I have already defined intent in connection with my charge on assault and battery on an officer.

Under our law, no person has the right to resist arrest, whether the arrest is legal or not, provided that the arrest is made by a law enforcement officer acting in the performance of his duties while in uniform or while exhibiting evidence of his authority, <u>or where the citizen knows or has reason to believe that he is a police officer engaged in the performance of his duties</u>.* Every person is under an obligation to submit to an arrest and to refrain from using force to

*<u>State v. Koonce</u>, 89 <u>N.J. Super.</u> 169, 184 (App. Div. 1965)

resist either the original apprehension or any continued detention in the custody of a law enforcement officer. If a person is illegally arrested or held in custody, he is obliged to use legal remedies to obtain his release rather than to resort to force.

The duty of a law enforcement officer to arrest carries with it the right to use force when reasonably necessary to apprehend a person and to detain him in the custody of the law. Therefore, it is no defense to a charge of resisting arrest or assault and battery upon a law enforcement officer that the defendant was acting to resist or defend himself against the use of reasonable force by a law enforcement officer who was acting in the performance of his duties by apprehending the defendant or by holding the defendant under his custody and control.

(IF THE DEFENDANT, IN ADDITION TO HIS GENERAL DENIAL, ALLEGES THE LAW ENFORCEMENT OFFICER USED EXCESSIVE FORCE AND THAT THE DEFENDANT ACTED ONLY IN SELF-DEFENSE, ADD THE FOLLOWING CHARGE.)

The defendant contends he is entitled to an acquittal on the charges against him on the ground that even if you find that he did resist arrest or commit an assault and battery upon a law enforcement officer acting in the performance of his duties, his conduct was justified because he acted not for the purpose of resisting arrest but in self-defense of his person from an unlawful attack by the law enforcement officer who was using excessive force upon the defendant which was not justified under the circumstances.

If a law enforcement officer uses such force as is reasonably necessary to arrest a person or to hold him in custody, such person so arrested or held cannot, under our law, use force to resist. However, if a law enforcement officer uses excessive force, that is force not justified under the circumstances, then the person arrested or held may use such degree of force as is reasonably necessary to defend himself. If, in turn, the person being arrested or held uses more force than is reasonably necessary to defend himself, that is, excessive force, then he becomes the aggressor and his conduct can no longer be justified as lawful self-defense. <u>If the citizen knows that if he desists from his physically defensive measures and submits to the arrest that the officer's excessive force would cease, the citizen must stop defending himself or lose the privilege of self-defense</u>.* It is for you to determine what is reasonable force and what is excessive force from the evidence in this case.

As to the burden of proof with respect to self-defense, I charge you that while the defendant raises the issue of self-defense in the case (and produces evidence in support of this allegation that he acted only in lawful self-defense,) this in no way shifts the burden of proof from the State, for as I previously explained to you, the State bears the burden of proving to your satisfaction beyond a reasonable doubt every element of the crime charged against the defendant and that burden never shifts from the State but remains upon the State throughout the entire trial of the case. Therefore,

*<u>State v. Mulvihill</u>, 57 <u>N.J. Super</u>. 151, 157 (1970).

the burden is upon the State to prove beyond a reasonable doubt that the defense of self-defense is untrue. The defendant has neither the burden nor the duty to show that he acted in lawful self-defense. You must determine, therefore, whether the State has proved each and every element of the offense charged including the absence of self-defense.

If after a consideration of all the evidence, including that relating to the subject of self-defense, you have a reasonable doubt as to whether the defendant acted in self-defense, or as to any of the other essential elements of the offenses charged, you should return a verdict of not guilty. If, however, after considering all the evidence, you are convinced beyond a reasonable doubt that the defendant did not act in self-defense, and have concluded that the State has proved each and every element of the offenses charged in the indictment beyond a reasonable doubt, then you should return a verdict of guilty as charged. <u>You must consider each offense separately and return a separate verdict on each, bearing in mind that lawful self-defense is a defense to both assault and battery on an officer and resisting arrest</u>.

<u>Cases</u>:

Common law rule that person has right to resist an illegal arrest not New Jersey law. <u>State v. Koonce</u>, 89 <u>N.J. Super</u>. 169 (App. Div. 1965)

Defense of self-defense available on charge of assault and battery upon a law enforcement officer where law enforcement officer uses excessive force. <u>State v. Mulvihill</u>, 57 <u>N.J</u>. 151 (1970).

Correction officers held to be law enforcement officers. Words

"law enforcement officer" used in statute held not to be unconstitutionally vague. State v. Grant, 102 N.J. Super. 164 (App. Div. 1968).

Citizen intervening in restraint of officer must justify his conduct by adequate supporting evidence that it reasonably appeared to him and he so reasonably believed that officer, though uniformed, was not engaged in bona fide performance of his duties but was actually committing an unlawful assault. State v. Montague, 55 N.J. 387, 405 (1970).

See also:

State v. Montague, 101 N.J. Super. 483 (App. Div. 1968).

State v. Bell, 102 N.J. Super. 70 (App. Div. 1968).

State v. Owens, 102 N.J. Super. 187 (App. Div. 1968).

State v. Moran, 73 N.J. 79 (1977).

Approved: 12/12/74

2.102 ASSAULT WITH OFFENSIVE WEAPON OR INSTRUMENT

The defendant is charged with violating the provisions of New Jersey Statute N.J.S.A. 2A:90-3, the pertinent parts of which read as follows:

> Any person who willfully or maliciously assaults another with an offensive weapon or instrument ... [is guilty of a violation of the law].

The following definitions will aid you in arriving at an understanding of this statute:

1. "Willfully." The word "willfully" means intentionally or voluntarily.
2. "Maliciously." Malice in the law connotes, "the intentional doing of a wrongful act to the injury of another without just cause or excuse."
3. "Assaults." An assault is an attempt or offer with unlawful force or violence to do a corporal (bodily) hurt or physical injury to another. For example, if I were to raise a club at you in a threatening manner, this would be an assault. With regard to assault, if you determine that the defendant had the apparent present ability

to carry out his design, this is sufficient to support a finding of guilt provided all other elements of the crime are proven. It is not necessary for the State to prove that the defendant did have the present ability to carry out the attempt or offer to injure another".

4. "Offensive weapon or instrument." "Offensive" means capable of being used for purposes of aggression. "Weapon or instrument" connotes an object, appliance, tool or implement which may be used for the purpose of injuring, disabling or destroying another.[1]

Therefore, in order to convict the defendant, the State has the burden of proving beyond a reasonable doubt each of the following elements:

1. That the defendant assaulted the victim.
2. That an offensive weapon or instrument was used.

3. That the defendant's conduct was voluntary or intentional.

Whereas here an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words, or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that the witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all the surrounding circumstances.

See State v. Drayton, 114 N.J. Super. 490, 492-493 (App. Div. 1971).

NOTE:

Possession or carrying any offensive weapon with intent to assault any person is a disorderly persons offense under New Jersey law. See N.J.S.A. 2A:170-3. The crucial words in the statute are, "with intent to assault." State v. States, 44 N.J. 285, 289 (1965).

The statute does not require that the weapon be in a person's hands or clothing. The Legislature intended to reach those with forbidden weapons at hand, within reach and immediately available for intended unlawful use. State v. Danziger, 121 N.J. Super. 44, 46-47 (App. Div. 1972), certif. den. 62 N.J. 191 (1972).

FOOTNOTE:

1. There is an apparent conflict between the terms used to describe N.J.S.A. 2A:90-3 and the words employed within the statute itself. The statute is entitled, "Assault with dangerous weapon...", but the words used within the statute are "offensive weapon or instrument." In reference to the definition of an offensive weapon it has been stated that it is, "as occasionally used in criminal law and statutes, a weapon primarily meant and adapted for attack and the infliction of injury, but practically the term includes anything that would come within the description of a 'deadly' or 'dangerous' weapon." Black's Law Dictionary 1233 (4th ed 1968) [Emphasis supplied]. See

also State v. Danziger, 121 N.J. Super. 44, 46-47 (App. Div. 1972). With this view in mind, Model Charge 2.251, Possession of a Dangerous Knife, might be revised to fit situations presented under N.J.S.A. 2A:90-3. This proposed revision would be as follows:

> Whether a ___ is a dangerous (offensive) weapon or instrument depends on the totality of the facts and circumstances surrounding the possession of the ___ and its intended use as those facts and circumstances appear from the evidence.
>
> The concept of an offensive weapon contemplates a weapon capable of being used for aggression (the concept of a dangerous weapon contemplates a weapon dangerous to life or human safety, one by use of which a fatal wound may probably or possibly be given). If the purpose of carrying the weapon or instrument is its use as a vehicle of assault, the person so using it is in violation of the terms of the statute. Purpose means an intent to accomplish a certain thing. Whether a person regards the ___ as an offensive weapon or instrument or as a defensive weapon or instrument is of no consequence. It is sufficient if he regards it as a weapon and uses it in a manner which is prohibited by the statute.
>
> There is no precise standard whereby a determination can be made as to whether a given ___ is a dangerous (offensive) weapon or instrument. Indeed, the very same ___ may be considered a dangerous (offensive) weapon or instrument under one set of circumstances and not be considered as such under other circumstances. Therefore, you should consider all of the attendant facts and circumstances such as the size, shape, and condition of the ___. If, upon a consideration of the total circumstances you conclude that the

purpose in carrying the weapon or instrument was to use it in assaulting another and such, in fact, was the result, such combined actions constitute a violation of the law.

Revision Approved: March 1974 (CMMJR)

ATROCIOUS ASSAULT AND BATTERY (2.103)

The Grand Jury of this County has returned an indictment against the defendant _____ charging him with atrocious assault and battery. The statute on which the indictment for atrocious assault and battery is based reads as follows:

> "Any person who shall commit an atrocious assault and battery by maiming or wounding another shall be guilty of a" . . . violation of the criminal laws.

An assault is an intentional attempt (or offer), with unlawful force or violence, intentionally to do a bodily hurt or physical injury to another. For example, if I were to point a gun at you in a threatening manner or raise a club at you in a threatening manner, that would be an assault.

(HERE INSERT DEFINITION OF INTENT USING MODEL CHARGE 4.181)

A battery is the actual doing of any physical hurt, however slight, to another.

An atrocious assault and battery is one which is savagely brutal or outrageously or inhumanly cruel or violent which results in a maiming or wounding of another. It is an

intentional act, one in which a person acting with intent to do bodily harm, deliberately commits an atrocious assault and battery on another person. The nature of the attack is of paramount importance in determining whether this crime has been committed, and the kind and severity of the injuries inflicted are other factors to be taken into consideration.

To maim means to cripple or mutilate in any way, that is, to inflict any injury which deprives a person of the use of a limb or member of the body, or renders him lame or defective in bodily function; it means to inflict bodily injury, to seriously wound, disfigure or disable.

To wound here means an injury to the body of a person caused by violence. It may be cuts, lacerations, fractures or bruises. Breaking of skin is not necessary in order for there to be a wounding.

The injuries need not be permanent but they must, nevertheless, be substantial rather than superficial. The nature and extent of the injuries should be considered in conjunction with the character of the assault made.

Intent, as I have stated, is a necessary element of this crime. If the act is unintentional or accidental, it is not a criminal offense. However, if the assault and battery is intentional, but the maiming or wounding is accidental

or unintentional, the defendant is still responsible for it if the maiming or wounding is the natural or probable consequence of the act or acts that the defendant intended to perform.

(If the evidence in the case warrants it, "accident" may be defined in the following manner)

> An accident is something which happens unexpectedly, wholly without design, and completely by chance. It is an unforeseen event, misfortune, act, or omission which is not the result of negligence or misconduct. Where a person commits an act or makes an omission through misfortune or by accident under circumstances that show no evil design, intention or culpable negligence, he does not thereby commit a crime.

State v. Edwards, 28 N.J. 292 (1958)

State v. Riley, 28 N.J. 188 (1958)

State v. Currie, 41 N.J. 531 (1964)

State v. Chiarello, 69 N.J. Super. 479 (App Div 1961)

State v. Abbott, 36 N.J. 63 (1961)

State v. Zelichowski, 52 N.J. 377 (1968)

State v. Provoid, 110 N.J. Super. 547 (App. Div. 1970)

State v. Bonano, 59 N.J. 515 (1971)

State v. Moran, 73 N.J. 79 (1977)

NOTE 1. If the defendant interposes a defense of Self Defense refer to Model Charge 3.280.

NOTE 2. Your attention is directed to State v. Saulnier, 63 N.J. 199 (1973). This case overrules State v. McGrath, 17 N.J. 41 (1954). Under Saulnier the Court should determine whether there exists a rational basis in the evidence for finding that the defendant might not be guilty of the higher offense charged but possibly guilty of a lesser included offense including a non-indictable lesser included offense. Therefore, it may be appropriate in an atrocious assault and battery case to submit to the jury the alternative lesser included offense of assault or assault and battery under the Disorderly Persons Act (N.J.S. 2A:170-26).

NOTE 3. Please refer your attention to State v. Crumedy, 144 N.J. Super. 25 (App. Div. 1976) certif. granted, 73 N.J. 46 (1977). Although this case, which involved superficial injuries, does not warrant any change in the present charge, the judges should be advised that in a special set of circumstances this decision would be helpful.

Approved: 1/29/75

2.104 ASSAULT WITH INTENT TO COMMIT ROBBERY

The defendant is charged in the Indictment with assault with intent to commit robbery in violation of N.J.S.A. 2A:90-2. The pertinent part of the statute reads:

> "Any person who commits an assault with intent *** to commit *** robbery *** is guilty of a [crime] ***."

To find the defendant guilty, the State must prove each of the following elements beyond a reasonable doubt:

1. An assault.
2. An intention by the defendant to commit robbery at the time of the assault.

An assault is defined as an attempt or offer with unlawful force or violence to do a corporal hurt or physical injury to another, under such circumstances as create a well-founded fear of imminent peril, coupled with an apparent present ability to execute the attempt if not prevented.[1]

Robbery is defined as the unlawful taking of money, personal goods or chattels from the person or presence of another by force or violence, or by putting him in fear, and with the intent to permanently deprive the owner or person in custody of said money or property.

"Force" or "violence" are synonymous words and include any application of force, even though it might entail no pain or bodily harm. Fear is the apprehension of harm.[2]

An essential element of this charge concerns the intent of the defendant to commit robbery. Where as here an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be fathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

It is the burden of the State to prove beyond a reasonable doubt that the defendant did commit an

Approved: 9/1/76

2.105 ASSAULT WITH INTENT TO KILL

The defendant is charged in this indictment with having committed the offense of assault with intent to kill. The statute upon which this indictment is based, so far as pertinent, reads as follows:

> N.J.S.A. 2A:90-2
>
> Any person who commits an assault with intent to kill ... is guilty of a [crime].

Two elements are essential to constitute the crime charged, each of which the State must prove beyond a reasonable doubt.

1. The defendant must have committed an assault and

2. At the time the assault was committed, he must have had the specific intent to kill the victim.

An assault is an attempt, offer or threat to do bodily harm with the present apparent ability to carry the threat into effect. There need not be an actual physical touching or bodily harm.

Intent is a purpose to do something, a resolve to accomplish a certain goal. It is a condition of the mind which cannot be seen and can only be determined by inference drawn from conduct, words, and acts. When the law says that the State must prove beyond a reasonable doubt that the defendant had the specific intent to kill at the time in question, it does not mean that the State must produce witnesses who can testify that the

defendant told them he had the specific intent to kill.

It is within the province of the jury to infer what the defendant intended from what you the jury find he actually did do and from all the facts and circumstances, declarations and evidence in the case.

The use of a deadly weapon, such as a gun, in itself justifies a factual inference that there was an intention to take life. This is, of course, an inference which you the jury are permitted to draw if you feel the circumstances warrant. It, of course, is not a mandatory inference. When we speak of a deadly weapon, we mean one which is liable to produce death.

The intent to kill involves the intent to unlawfully take the life of another without reasonable provocation or justifiable casue or excuse.

1. State v. Gallagher, 83 N.J.L. 321 (1912)
2. State v. Thompson, 65 N.J. Super. 189, 195 (1961)
3. State v. Natale, 138 N.J. Super. 241, 244 (1975)

Approved: April

2.110

BOOKMAKING

Defendant is charged with the crime of bookmaking. The statute in question, N.J.S.A. 2A:112-3 reads in pertinent part as follows:

> "Any person who, habitually or otherwise... makes or takes what is commonly known as a "book", upon the running, pacing, or trotting, either within or without this State, of any horse, mare or gelding, or conducts the practice commonly known as "bookmaking".....is guilty of....a violation of the gambling laws. This section shall not be construed to apply to pari-mutual betting at race meetings as authorized by the Constitution of this State or any statute passed in pursuance thereof."

Bookmaking is the intentional making of a book of bets on horse races, sporting events, and the like. This means the intentional making or taking and recording or registering of bets or wagers on races, ball games, fights and kindred contests.

A wager or bet is what we commonly understand to it to be. It is a transaction where a sum of money is laid, staked, pledged or put-up, as between two parties, the bettor and the bookmaker, upon the event or outcome of a race or contest or any contingent issue. The person with whom the bet is placed or who takes the bet is called the "bookmaker". The bookmaker in accepting or taking the bettor's money, agrees to pay back a certain sum of money if the bettor is successful in predicting the outcome of the contingency. For example, a certain horse winning a certain race, a certain team defeating its opponents in a given contest, a particular prize fighter being successful in a fight, or whatever the case may be.

I will now inform you of a few things about the law on bookmaking which may not be clear to you from my reading of the statute.

First, the offense of bookmaking resides in the gambling aspect of the bookmaker's operation rather than the method whereby he keeps track of bets. It makes no difference whether the bets are committed to memory or to paper. It is not necessary for the State to prove that a complete tangible record or any tangible record was made.

Next, you should understand that the statute forbids bookmaking "habitually or otherwise". "Habitually or otherwise" as used in this statute means that the bookmaking took place "on at least one occasion".*

Further, I must inform you that under our law it is immaterial whether the odds are quoted by the bookmaker or fixed by the official pay-offs under the legal pari-mutual system after the race is run, or in some other fashion as it may pertain to other types of sporting events, contests, or contingencies. In any event, the statute is violated by the bookmaker.

Finally, it is to be noted that while the bookmaker commits a criminal offense by taking a bet, the act of the bettor in making the bet is not illegal.

These explanations are designed to aid you in your understanding of N.J.S.A. 2A:112-3.

What I am about to explain to you is how the laws on "aiding or abetting" apply to the offense of bookmaking.

It is not necessary in order to sustain its burden of proof that the State show, through the evidence,

that the defendant made or accepted the bet or bets as the principal, or had the responsibility of paying off the winners of any bets that may have been made with him. It is sufficient to warrant a conviction if the proof shows to you beyond a reasonable doubt that the defendant intentionally aided or abetted or participated in the prohibited practice of bookmaking. Under our statutes, anyone who intentionally aids, abets, assists or participates in the making of book is guilty as a principal. The word "aid" means to assist, support, or supplement the efforts of another. The word "abet" means to encourage, counsel, incite, or instigate.

(Here insert Model Charge on Intent 4.181)

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*State v. Clark, 137 N.J.L. 12 (1948)

State v. Bogen, 13 N.J. 137 (1953)

(Note: See State v. Adreano, 117 N.J. Super. 498 (App. Div. 1971) Held that where a person acts as a mere conduit or currier of another's bets which are to be made, or are made at a lawful place of betting on races, he is not guilty of bookmaking. The test here appears to be whether or not this "middleman" gains a benefit from the transaction.

See also: State v. Juliano, et al., 52 N.J. 232 (1968) which deals with indictments containing multiple counts of alleged bookmaking; and, State v. Kuznitz, 36 N.J. Super. (App. Div. 1955) which discusses aiding and abetting in the bookmaking area and also throws some light on the problem of the structure of the gambling operation in relation to this statute.

2.111 BREAKING AND ENTERING OR ENTERING - N.J.S.A. 2A:94-1

The indictment charges that the defendant willfully or maliciously broke and entered the _____ of _____ with intent to steal in violation of the provisions of N.J.S.A. 2A:94-1.

The criminal law upon which this charge is based reads as follows:

"Any person who willfully or maliciously breaks and enters (or enters without breaking) any _____ with intent to steal is guilty of a violation of the law."

Accordingly, you are to determine whether the state has proven to you beyond a reasonable doubt each of the following elements which make up this offense:

1. That there was a breaking and entering. With respect to this element you must note that it is not necessary for the state to prove a breaking if it proved entering without breaking.

2. That the breaking and entering (or entering without breaking) was either willful or malicious.

3. That at the time of the breaking and entering (or entering without breaking) the defendant intended to steal. The intent to steal must co-exist with the act of breaking and entering (or entering without breaking).

I will now attempt to define for you some of the terms used in each of these three elements.

With respect to breaking and entering (or entering without breaking) I repeat to you that this element is proven if the state proves either of the alternatives. So far as a breaking is concerned any act of physical force however slight - such as lifting up a latch - is sufficient for a finding that there was a breaking within the wording of the statute. On the other hand, if you consider that the state has not proven beyond a reasonable doubt that there was a breaking, and you are therefore considering whether or not there was an entering then you must know that an entry is accomplished if any part of the body, an arm, a hand, a finger or a foot, or even if an instrument was inserted into the building (or as the case may be).

With respect to the second element of the crime, that is, whether or not it was either willful or malicious, for your purposes I charge you that these terms are synonymous and that in considering this element, willfulness or maliciousness, you will ask yourself whether the state has proven to you beyond a reasonable doubt that the defendant acted voluntarily to accomplish a wrongful purpose.

Finally, with respect to the third element you will ask yourself whether the state has proven to you beyond a reasonable

doubt that the defendant at the time he broke and entered or entered without breaking intended to steal, that is, that he intended to take and carry away someone else's property without any claim of right and with the intent to wholly deprive the owner of the property. I further charge you that with respect to this third element, that is the intent to steal, you may gather such intent from his acts and conduct and from all that was said and done at the particular time and place and from all the surrounding circumstances. In other words, intent is a condition of the mind which cannot be seen but can only be determined by inferences, from conduct, words or acts. Logically then it is not necessary for the state to prove that the defendant ever said he had a certain intent at the time and place concerned.

In conclusion I charge you that in determining whether or not the crime has been proven, you will ask yourself whether the state has proven beyond a reasonable doubt each of these three elements, namely: a breaking and entering, or in the alternative an entering without breaking; willfulness or maliciousness, that is, whether the act was done voluntarily and to accomplish a wrongful purpose; and finally, the intent to steal at that time.

State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954)
State v. Tassiello, 75 N.J. Super. 1 (App. Div. 1962)
aff'd 39 N.J. 282 (1963)
State v. Simmons, 98 N.J. Super. 430 (App. Div. 1968)
State v. Martinez, 112 N.J. Super. 552 (App. Div. 1970)
State v. Wilbely, 122 N.J. Super. 463 (App. Div. 1973)

2.112 BRIBERY OF A PUBLIC OFFICIAL

The indictment charges the defendant with bribery in violation of common law or appropriate statute.[1]

The essential elements of this offense are:

(1) defendant offered or gave any money, real estate or thing of value

(2) to any person in a public office

(3) that the defendant knew the official character of the person to whom he offered or gave them of value

(4) with the intent to influence the officer's behavior in office and incline him to act contrary to the known rules of honesty and integrity.[2]

The amount of the bribe is not material. Anything may serve as a bribe so long as it is of sufficient value in the eyes of the person bribed.[3] Also it is not essential that immediate action or inaction is called for.[4] It is immaterial whether the taker of the bribe lives up to his corrupt promise.[5] The offense is complete when the offer is made.[6] It is immaterial that the bribe is refused.

In order to constitute bribery, one must have made the offer to a public official. However, it is not necessary that the act requested be one which the official has authority to do.[7] It is sufficient if he has official power, ability, or apparent ability to bring about or contribute to the desired end.[8]

In order to find one guilty of bribery, it is imperative that the corrupt intent be established. The necessary intent requires only an intent to subject the official action of the recipient to the influence of personal gain or advantage rather than the public welfare since the social interest demands that official action should be free from improper motives of personal advantage.[9] A corrupt intent need not be shown to both parties to the transaction.[10] It is sufficient if it is established with respect to the party who is the defendant in the trial.[11]

FOOTNOTES

1. Bribery is an indictable misdemeanor in New Jersey. Our statutes against bribery merely define and fix the punishment for the offense in certain cases; they do not repeal or abrogate or otherwise alter the common law. 1 Schlosser, Criminal Laws of N.J. § 25:1. See also St. v. Begyn, 34 N.J. 35, 167, A2d 161; St. v. Ellis, Supra 1868; 33 N.J.L. 102. The specific statutes are N.J.S.A. 2A:93-1, Bribery of judge or magistrate, 2A:93-2, Bribery of legislators, 2A:93-4, Soliciting or receiving reward for official vote, 2A:93-6, Bribery in connection with government work, 2A:93-7, Bribery of a labor representative, 2A:93-8, Bribery of fireman, 2A:93-10 & 11, Bribery of participant in a sporting event. Except for 2A:93-1 and 2A:93-2 which made bribery a high misdemeanor, all other bribery is a misdemeanor.

2. 1 Schlosser, Crim. Laws of N.J. 5390 (1953), St. v. Begyn, 34 N.J. 35, 47, 167 A2d 161, (1961).

3. Wharton Crim. Law & Procedure, § 1386

4. Wharton Crim. Law & Procedure, § 1380

> A bribe may be given to purchase particular official conduct on the possibility of a certain event happening in the future. St. v. Ellis (N.J.), (Supra).

5. St. v. Begyn, supra.

6. St. v. Ellis, supra.

(A) The offense is complete when an offer of reward is made to influence the vote or action of the official. It need not be averred, that the vote if procured would have produced the desired result.

7. St. v. Begyn, supra

8. St. v. Begyn, supra
St. v. Ellis

It need not be averred that the vote if procured would have produced the desired result, nor that the official or the body of which he was a member had authority by law to do the thing sought to be accomplished.

9. St. v. Begyn, Supra.

10. Wharton's Criminal Law & Procedure, § 1381

11. Wharton's Criminal Law & Procedure, § 1381
Wharton, § 1384 states:

> At Common Law, bribery and an attempt to bribe are both misdemeanors. Hence, apart from statute any distinction between bribery and an attempt to bribe is of no practical importance.

Approved: 9/1/76

2.120 CARNAL ABUSE

In this case the defendant has been indicted on the charge of Carnal Abuse which is a violation of N.J.S.A. 2A:138-1. It provides in effect as follows:

> "Any person who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child (under the age of 12 years,) (of the age of 12 years or over, but under the age of 16 years,) with or without her consent, is guilty of a ... [crime].

"Carnal Abuse" is an act of assault or debauchery of the female sexual organs by the genital organ of a male which may fall short of actual penetration; and it is not necessary to show injury to the genital organs of the female victim in order to constitute a violation of the statute in question.

It is immaterial whether the abuse was with or without the consent of the girl. The law throws its protection about the child who is under the statutory age by providing that she cannot, in law, consent : she cannot by her consent relieve a person taking advantage of her immaturity of the responsibility for his acts in that respect.

The state must affirmatively prove that the girl was (between the ages of 12 and 16) (under the age of 12 years) and that the defendant carnally abused her.

Debauchery includes any touching of or physical contact with the female sexual organs by the genital organ of the male. There must be a physical touching and contact by the genitalia of the defendant with, against or into the vagina of the female. Sexual penetration need not be shown. It is not necessary to show that any physical injury has been caused to the female organs of the victim.

Thus, if the state has proven beyond a reasonable doubt that the defendant unlawfully and carnally abused the female in question, as indicated in the indictment, and that he did so when she was (under 12 years of age) (of the age of 12 years or over, but under the age of 16 years), then the state has sustained its burden of proof even though there may have been evidence to indicate that the girl consented to the act.

In such a case, consent by the female does not excuse the defendant. In the eyes of the law, a girl under the statutory age is incapable of giving consent to any act of carnal knowledge or abuse.

It is not a defense to the charge in question that the defendant did not know the age of the female; that he acted on good faith and believed that she was above the prohibitive age; or that he was misled by some representation or by her appearance.

See the following:

State v. Moore, 105 N.J. Super. 567 (App. Div. 1969), certif. den., 54 N.J. 502 (1969), certif. den., 58 N.J. 435 (1971)

State v. Lefante, 12 N.J. 505 (1953)

State v. Lefante, 14 N.J. 584 (1954)

Farrell v. State, 54 N.J.L. 416 (Sup. Ct. 1892)

State v. MacLean, 135 N.J.L. 491 (Sup. Ct. 1947)

State v. Huggins, 83 N.J.L. 43 (Sup. Ct. 1912), aff'd, 84 N.J.L. 254 (E.&A. 1913)

Revised: 4/10/78

2.121 CARRYING FIREARM

The pertinent language of the statute with which the defendant is charged with having violated reads as follows:

> Except as hereinafter provided, any person, who carries, on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area:
>
> a. A pistol or revolver without first having obtained a permit to carry the same in accordance with the provisions of this chapter, is guilty of a (crime). N.J.S.A.2A:151-41.

Every crime contains certain essential elements which the state must prove to the satisfaction of the jury beyond a reasonable doubt in order to obtain a conviction. The crime with which the defendant in this case is charged with having committed contains two essential elements, which are:

1) that there was a pistol or revolver capable of being fired.

2) that the defendant carried, held or possessed the pistol or revolver in a public place or area.

The first essential element is that there was a pistol or revolver capable of being fired. Another section of the statute defines a pistol or revolver as including any firearm with an overall length of less than 26 inches, or a shotgun having a barrel or barrels of less than 16 inches, and therefore, I charge you that Exhibit _____ in evidence is a pistol or revolver within the meaning of these terms

and therefore this first essential element has been established as a matter of law and need not be determined by you.

(IF OPERABILITY HAS NOT BEEN STIPULATED
SEE 4.151)

The second essential element is that the pistol or revolver Exhibit ____ in evidence, was in the possession of the defendant in a public place or area.

(INSERT HERE MODEL CHARGE ON "POSSESSION")

Public place in this statute means any place, private or public except one's dwelling house or place of buisness. And this exemption applies only to the proprietor of a business, not employees - no matter what position they may hold. [1]

You will recall that the statute provides that a person is not guilty of a violation of the statute if he has obtained a permit to carry the pistol or revolver. The State is not required to prove that no permit had been issued to the defendant. If a person charged with a violation of this statute, did obtain a permit, that fact lies more immediately within his knowledge and then the burden would be on such person to produce the permit or prove this issuance thereof. This, of course, in no way affects the burden of the State to prove the guilt of the defendant beyond a reasonable doubt.

(The defendant does not claim he had a permit to carry the firearm, so the exception in the statute is inapplicable.)

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[1] N.J.S.A. 2A:151-42(a); State v. Johnson, 125 N.J. Super. 344 (App. Div. 1973), affirmed 65 N.J. 388 (1974).

NOTES

N.J.S.A. 2A:151-7 providing for presumptive evidence of possession by all persons in vehicle in which firearm is present should not be mentioned to the jury. State v. Humphreys, 54 N.J. 406 (1969).

There is no burden on the state to prove that the defendant did not have a permit to carry the weapon. State v. Blanca, 100 N.J. Super 241 (App. Div. 1968); State v. Humphreys, 101 N.J. Super 539, (App. Div. 1968) reversed on other grounds 54 N.J. 406 (1969); but see State v. Hock, 54 N.J. 526 (1969); State v. Rabatin, 25 N.J. Super 24 (1953).

Where there is more than one occupant in the automobile and it can be reasonably inferred they were on a criminal mission and knew of the presence of the weapon in the automobile, aiding and abetting statute N.J.S.A. 2A:85-14 may be charged to jury as to occupants not in actual physical possession of the weapon. State v. Humphreys, 54 N.J. 406 (1969).

Unnecessary to charge exceptions to statute set forth in N.J.S.A. 2A:151-42 and 43 when issue not raised by defendant and/or no request to charge same; State v. Thomas, 105 N.J. Super 331 (1969) affirmed 57 N.J. 143 (1970).

See also: State v. DiRienzo, 53 N.J. 360 (1969); State v. Labato, 7 N.J. 137 (1951); State v. Lewis, 93 N.J. Super 212 (1966); State v. Repp, 69 N.J. 222 (1976).

Approved: 6/26/78

2.122 CONSPIRACY

The following two charges on conspiracy are generally applicable to the same types of conspiracy offenses. The charge 2.122-B CONSPIRACY is more lengthy than the charge 2.122-A CONSPIRACY and provides more detail.

PLEASE NOTE:

Two parts of the Appellate Division have differed on the applicability of N.J.S.A. 2A:98-1, -2 to a conspiracy to violate the Controlled Dangerous Substances Act charged under N.J.S.A. 24:21-24(a). State v. Clark, 151 N.J. Super. 529 (App. Div. 1977) held that N.J.S.A. 24:21-24(a) refers to an offense that is separate and distinct from the crime proscribed by the general conspiracy statute, N.J.S.A. 2A:98-1, -2, and does not require the State to allege an overt act in furtherance of the conspiracy. However, in State v. Hernandez, ____ N.J. Super. ____ (App. Div. 1978), N.J.S.A. 24:21-24(a) was held subject to the requirement of N.J.S.A. 2A:98-2 that the State allege an overt act in furtherance of the conspiracy. The Supreme Court has not yet resolved the disagreement.

Approved: 5/29/74

2.122-A CONSPIRACY

NOTE: This charge deals only with the offense of conspiracy to commit a crime under N.J.S.A. 2A:98-1(a). There are other subsections, (b) through (h), involving conspiracies to do other things.

In view of 2A:98-2, the portions of the charge in parentheses should only be included where the conspiracy is to commit a crime other than arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery, sodomy, or where the parenthesized portion of the charge is otherwise applicable.

Charge

Under the _____ count of the indictment, the defendants are charged with conspiracy to commit the crime of _____.

- OR -

Under the _____ count of the indictment, the defendant is charged with the crime of conspiring with others (another), who are (is) not before you for trial, to commit the crime of _____. The fact that there is (are) no other defendant(s) on trial does

not matter, if you find the defendant guilty of the crime of conspiracy beyond a reasonable doubt.

N.J.S.A. 2A:98-1 as applicable provides as follows:

> Any two or more persons who conspire:
>
> (a) to commit a crime *** are guilty of...conspiracy.

(And N.J.S.A. 2A:98-2 which provides in pertinent part as follows:

> No person shall be convicted *** for conspiracy unless some act be done to effect the object thereof by one or more of the parties thereto.)

A conspiracy to commit a crime is a separate and distinct crime from the actual commission of the substantive offense. In other words a defendant may be found guilty of the crime of conspiracy regardless of any guilt or innocence as to the (specify substantive crime). In order to find the defendant guilty of the crime of conspiracy, the State need not prove the defendant actually committed the crime of _____; the State must only prove the defendant conspired with someone else to commit that crime.

The State does not have to prove each and every element of the substantive crime, in order to find the defendant guilty of conspiracy. However, it is

necessary for you to know the essential elements of the substantive offense so you may determine whether or not there was a conspiracy to commit the crime of _____. The essential elements of the substantive offense are as follows: (or will be explained to you later in this charge)

(HERE REFER TO MODEL CHARGE ON THE PARTICULAR CHARGE)

The crime of conspiracy itself is an agreement or combination between two or more persons to commit a crime (and an overt act done by one or more of them in furtherance of that agreement). The agreement itself may be proved drom direct evidence or it may be proved by circumstances from which the jury might infer such an agreement. The State is not required to prove an actual meeting at which a formal agreement was made or spoken. Likewise, it is not essential that there be direct contact between all the parties to the conspiracy or that all enter into the conspiratorial agreement at the same time. The State is required to prove beyond a reasonable doubt that the defendant joined knowingly and intentionally in some manner or way in the scheme, plan or agreement with another person (or persons) to (specify particular crime here).

Whether the conspiracy succeeds or fails makes no difference. (Even if you determine beyond a reasonable doubt that the State has proven that the defendant entered into an agreement or combination to commit a crime, you cannot bring in a verdict of guilty unless you also determine beyond a reasonable doubt that the State has proven an overt act, as specified in the indictment, which overt act has been committed by one or more of the alleged conspirators in furtherance of the agreement or combination. An overt act means an affirmative act done in furtherance of the object of conspiracy).

(CHARGE WHERE APPLICABLE)

(The elements of knowledge and willfulness will be discussed later; however, you must remember that one who merely happens to associate with another, or happens to be present at a particular time or place, or happens to act in a way to further the object of the conspiracy, but who does not have knowledge of the conspiratorial purpose does not thereby become a conspirator.)

(An overt act, in furtherance of the conspiracy which has been proven against one (or more) of the co-conspirators named in the indictment, whether a defendant

or not, may be deemed the act(s) of all. Thus, the State is not required to prove an overt act by each and every one of the alleged co-conspirators, and it is not obliged to prove every overt act set out in the indictment.)

(HERE DISCUSS OVERT ACTS SET FORTH IN THE INDICTMENT)

It takes at least two persons to be in a conspiracy, and you should not bring in a verdict of guilty unless you determine beyond a reasonable doubt that at least two of the conspirators specified in the indictment, (whether one of them is a defendant or not) participated in the conspiracy (and that at least one of the conspirators performed at least one act in furtherance of the conspiracy). Before you can find a defendant guilty of the charge of conspiracy, you must be satisfied by the evidence beyond a reasonable doubt, that the defendant knowingly and willfully participated in the conspiracy with the intent to advance or further the agreement.

To participate knowingly and willfully means to act voluntarily and with a full understanding that the law forbids that which is being planned. If the defendant intentionally and with knowledge encouraged, advised

or assisted any other person for the purpose of furthering the common scheme or design, he is a conspirator.

(CHARGE WHERE NECESSARY)

(But, if a person has no knowledge of a conspiracy but simply happens to be present or to act in a way that furthers the object of that conspiracy, he does not thereby become a conspirator for the reason that he is lacking the necessary knowledge and intent.)

Thus, members of the jury, if you are satisfied beyond a reasonable doubt that the defendant did knowingly and willfully reach or have an understanding or agreement with some person (or persons) to (here specify crime) (and such defendant or any co-conspirator performed an overt act in furtherance of this understanding), then you must find defendant guilty of the crime of conspiracy.

If you are not satisfied beyond a reasonable doubt that this defendant did knowingly and willfully reach or have such an understanding or agreement, or that an overt act was performed by this defendant or any co-conspirator in furtherance of such understanding, then you must find this defendant not guilty of the crime of conspiracy.

During the course of the charge I have been referring to the words Intent and Knowledge.

(HERE CHARGE STANDARD CHARGE ON INTENT AND KNOWLEDGE)

Query - are the enumerated common law or statutory crimes?

See State v. Butler, 27 N.J. 560, 588 (1958)

State v. Blinsinger, 114 N.J. Super. 318 (App. Div. 1971)

1. State v. O'Brien, 136 N.J.L. 118 (1947).
2. State v. Lennon, 3 N.J. 337 (1949).
3. State v. Carbone, 10 N.J. 329 (1952).
4. State v. Oats, 32 N.J. Super. 435 (App. Div. 1954).
5. State v. Dennis, 43 N.J. 418 (1964).
6. U.S. v. Natale, 250 F. Supp. 381 (1966).
7. State v. Carroll, 51 N.J. 102 (1968).
8. State v. Moretti, 52 N.J. 182 (1968).
9. State v. Farinella, ____ N.J. Super. ____ (App. Div. 1977)

It should be noted that if a factor unknown to the conspirators makes it impossible for them to complete their intended crime, this in no way lessens the degree of culpability involved in the criminal combination. State v. Moretti, 52 N.J. 182, 187 (1968)

Essential elements of statutory crime of "conspiracy" are the criminal agreement and an overt act in furtherance thereof.

State v. Moretti, 97 N.J. Super. 418, 421 (App. Div. 1967)

When uncorroborated testimony of co-conspirator is offered to prove conspiracy, issue before jury is one of credibility and it is up to jury to determine what weight should be attributed to it.

State v. Burgess, 97 N.J. Super. 428, 435 (App. Div. 1967)

State may not carve up single conspiracy into smaller conspiracies for purposes of multiple prosecutions.

State v. Ferrante, 111 N.J. Super. 299, 303 (App. Div. 1970)

Gist of offense of conspiracy is the criminal agreement which may be established by inferences drawn from the circumstances. Do not need direct contact with the parties.

State v. Yormark, 117 N.J. Super. 315, 330 (App. Div. 1971)

"A conspiracy ... has generally been defined ... as a combination between two or more persons by concerted

action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."
State v. Collins, 120 N.J. Super. 48, 50 (Law Div. 1972)

It is plain and therefore reversible error even without an objection from defendant's counsel, for the trial judge to fail to instruct the jury that out-of-court declarations of the defendant's alleged co-conspirators which were not made in the defendant's presence and which inculpated defendant are inadmissible and should not be considered as to the defendant's guilt unless and until the jury finds on the basis of other evidence the defendant's participation in the conspiratorial scheme.
U.S. v. Rodrigues, 491 F. 2d 663 (3rd Cir. 1974)

"This Court has held that where a conspiracy is shown to exist, the acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against any other conspirator. The rule is applicable where it is charged that a crime was committed in pursuance of a conspiracy, whether or not the indictment contains a count for such conspiracy."
State v. Louf, 64 N.J. 172, 177 (1973)

Approved: 12/12/77

2.122-B CONSPIRACY

NOTE: This charge deals only with the offense of conspiracy to commit a crime under N.J.S.A. 2A:98-1(a). There are other subsections, (b) through (h), involving conspiracies to do other things.

In view of 2A:98-2, the portions of the charge in parentheses should only be included where the conspiracy is to commit a crime other than arson[1], breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery, sodomy, or where the parenthesized portion of the charge is otherwise applicable.

Charge

Under the _____ count of the indictment, the defendants are charged with conspiracy to commit the crime of _____.

- OR -

Under the _____ count of the indictment, the defendant is charged with the crime of conspiring with others (another), who are (is) not before you for trial, to commit the crime of _____. The fact that there is (are) no other defendant(s) on trial does not matter, if you find the defendant guilty of the crime

[1]Conspiracy to burn a building other than a dwelling house is prohibited by N.J.S. 2A:89-2 [and] does require proof of an overt act to establish the conspiracy. State v. Newell, ____ N.J. Super. ____ (App. Div. 1977).

of conspiracy beyond a reasonable doubt.

N.J.S.A. 2A:98-1 as applicable provides as follows:

> Any two or more persons who conspire:
>
> (a) to commit a crime *** are guilty of...conspiracy.

(And N.J.S.A. 2A:98-2 which provides in pertinent part as follows:

> No person shall be convicted *** for conspiracy unless some act be done to effect the object thereof by one or more of the parties thereto.)

A conspiracy to commit a crime is a separate and distinct crime from the actual commission of the substantive offense. In other words a defendant may be found guilty of the crime of conspiracy regardless of any guilt or innocence as to the (specify substantive crime). In order to find the defendant guilty of the crime of conspiracy, the State need not prove the defendant actually committed the crime of _____; the State must only prove the defendant conspired with someone else to commit that crime.

The State does not have to prove each and every element of the substantive crime in order to find the defendant guilty of conspiracy. However, it is necessary

for you to know the essential elements of the substantive offense so you may determine whether or not there was a conspiracy to commit the crime of _____. The essential elements of the substantive offense are as follows: (or will be explained to you later in this charge).

(HERE REFER TO MODEL CHARGE
ON THE PARTICULAR CHARGE)

The crime of conspiracy itself is an agreement or combination between two or more persons to commit a crime (and an overt act done by one or more of them in furtherance of that agreement). The agreement itself may be proved from direct evidence or it may be proved by circumstances from which the jury might infer such an agreement. The State is not required to prove an actual meeting at which a formal agreement was made or spoken. Likewise, it is not essential that there be direct contact between all the parties to the conspiracy or that all enter into the conspiratorial agreement at the same time. The State is required to prove beyond a reasonable doubt that the defendant joined knowingly and intentionally in some manner or way in the scheme, plan or

agreement with another person (or persons) to (specify particular crime here).

What the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common unlawful plan.

You are instructed, however, that suspicion, however strong, is never proof under our concept of law, and you may not substitute suspicion for evidence.

Whether the conspiracy succeeds or fails makes no difference. (Even if you determine beyond a reasonable doubt that the State has proven that the defendant entered into an agreement or combination to commit a crime, you cannot bring in a verdict of guilty unless you also determine beyond a reasonable doubt that the State has proven an overt act, as specified in the indictment, which overt act has been committed by one or more of the alleged conspirators in furtherance of the agreement or combination. An overt act means an affirmative act done in furtherance of the object of conspiracy).

(CHARGE WHERE APPLICABLE)

(The elements of knowledge and wilfulness will be discussed later; however, you must remember that one who merely happens to associate with another, or happens to be present at a particular time or place, or happens to act in a way to further the object of the conspiracy, but who does not have knowledge of the conspiratorial purpose does not thereby become a conspirator.)

(An overt act, in furtherance of the conspiracy which has been proven against one (or more) of the co-conspirators named in the indictment, whether a defendant or not, may be deemed the act(s) of all. Thus, the State is not required to prove an overt act by each and every one of the alleged co-conspirators, and it is not obliged to prove every overt act set out in the indictment.)

(HERE DISCUSS OVERT ACTS SET FORTH
IN THE INDICTMENT)

(The State alleges that it has offered proof of these overt acts beyond a reasonable doubt. It is necessary for you to conclude, beyond a reasonable doubt, that at least one of these overt acts was done either by one of the defendants or one of the co-conspirators named in the indictment or one of the alleged other unnamed

persons, to effect the object of the conspiracy, although it is not necessary that the State prove all of the overt acts alleged in the indictment.)

It takes at least two persons to be in a conspiracy, and you should not bring in a verdict of guilty unless you determine beyond a reasonable doubt that at least two of the conspirators specified in the indictment, (whether one of them is a defendant or not), participated in the conspiracy (and that at least one of the conspirators performed at least one act in furtherance of the conspiracy). Before you can find a defendant guilty of the charge of conspiracy, you must be satisfied by the evidence beyond a reasonable doubt, that the defendant knowingly and willfully participated in the conspiracy with the intent to advance or further the agreement.

To participate knowingly and willfully means to act voluntarily and with a full understanding that the law forbids that which is being planned. If the defendant intentionally and with knowledge encouraged, advised or assisted any other person for the purpose of furthering the common scheme or design, he is a conspirator.

(CHARGE WHEN NECESSARY)

(But, if a person has no knowledge of a conspiracy but simply happens to be present or to act in a way that furthers the object of that conspiracy, he does not thereby become a conspirator for the reason that he is lacking the necessary knowledge and intent.)

Thus the elements that the State must prove to you, beyond a reasonable doubt, in order for you to find a defendant guilty of the crime of conspiracy as alleged in this indictment are as follows:

1. The existence of an agreement or combination between two or more persons to commit a crime.

2. That the defendant knowingly became a member of the conspiracy with knowledge of its objectives.

Whether the defendant acted intentionally and knowingly may be proven by circumstantial evidence; it rarely can be established by another means; since intent refers to the state of mind with which the defendant acted.

While witnesses may see and hear, and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. In determining the

issue as to intent and knowledge you jurors may take into consideration any statements made and acts done by the defendant and all the surrounding facts and circumstances in evidence which may aid in determination of these states of mind.

The jury will remember that the defendant is not to be convicted on mere suspicion or conjecture. So it is not enough that the jury might suspect or surmise that the defendant should have known that any acts or statements made by him were made in furtherance of a common plan or conspiracy. You must find beyond a reasonable doubt that this defendant had actual knowledge of the conspiracy and actual knowledge of its objects and purposes and that the conduct of the defendant was not a result of negligence, error or honest mistake in judgment.

The crime of conspiracy is distinct from the substantive offense which the conspirators plotted to commit. The essence of the statutory crime of conspiracy is the joining together of the conspirators with an unlawful intent. It is this unlawful purpose upon which they agreed which makes a conspiracy a crime (once any overt act is committed in furtherance of it).

The crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime,

take any step in preparation. As I stated earlier, the gist of the offense is the criminal agreement and focuses primarily on the intent of the defendants.

(3. The third element is that one of the conspirators knowingly committed at least one of the overt acts charged in the indictment.

4. The fourth element is that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.)

Thus, members of the jury, if you are satisfied beyond a reasonable doubt that the defendant did knowingly and willfully reach or have an understanding or agreement with some person (or persons) to (here specify crime) (and such defendant or any co-conspirator performed an overt act in furtherance of this understanding), then you must find defendant guilty of the crime of conspiracy.

If you are not satisfied beyond a reasonable doubt that this defendant did knowingly and willfully reach or have such an understanding or agreement, or that an overt act was performed by this defendant or any co-conspirator in furtherance of such understanding, then you must find this defendant not guilty of the crime of conspiracy.

If you are not satisfied beyond a reasonable doubt that this defendant did knowingly and willfully

reach or have such an understanding or agreement, or that an overt act was performed by this defendant or any co-conspirator in furtherance of such understanding, then you must find this defendant not guilty of the crime of conspiracy.

During the course of the charge I have been referring to the words Intent and Knowledge.

(HERE CHARGE STANDARD CHARGE ON INTENT AND KNOWLEDGE)

(CHARGE WHEN NECESSARY)

(A separate crime or offense is charged against the various defendants in each of the counts of the indictment as I have just explained to you. Each offense and each defendant, and the evidence pertaining to the offense and to that defendant, should be considered separately. The fact that you may find one or more of the defendants guilty or not guilty on one or more of the offenses charged against him, should not control your verdict as to the other offenses charged against that particular defendant or as to the charges against the other defendants).

(CHARGE WHEN NECESSARY)

(In determining whether or not a particular defendant was a member of the conspiracy, you cannot consider what others may have said or done. Membership in a conspiracy must be established by the evidence in the case as to that defendant's own conduct, what he himself willfully said or did, and cannot be based on so-called constructive notice because of facts known to others.

You will recall that testimony of acts and statements made by alleged co-conspirators in the absence of some of the defendants was received on a tentative basis in evidence. This testimony was received subject to independent proof of the existence of the conspiracy, and the absent defendants knowing participation in the conspiracy. If you do not find on independent proof, that a conspiracy existed and that the absent defendant knowingly participated in the conspiracy, the tentative basis is destroyed and all such testimony must be ignored as to such absent defendant.

At the time such testimony was received, the court instructed you that the evidence was received only as to certain of the defendants or that such

evidence could not be considered by you as to other of the defendants.

Hearsay statements are those made out of the presence of a defendant, and normally are not admissible into evidence as to such defendant. There is an exception to this rule which permits such hearsay statements to be received into evidence as admissible against a defendant where at the time the statement was made the defendant and the person making the statement were participating in a plan to commit a crime, and the statement was made in furtherance of that plan.

This rule of evidence is based upon the legal principle that acts and statements made by co-conspirators in furtherance of a conspiracy are admissible against all the conspirators, since they are deemed the acts and declarations of all. This would apply even to those statements made before a particular defendant joined the conspiracy. This is because once a person joins an existing conspiracy, he is bound by all of the statements and actions of his co-conspirators in furtherance of that conspiracy before, as well as after, his having joined that conspiracy.

However, the existence of a conspiracy and of a defendant's knowing and willful participation in that

conspiracy, must be shown by independent proof, exclusive of such hearsay statements before acts and statements made by co-conspirators out of the presence of that defendant are binding upon him.

The determination, by the court in ruling upon the admissibility of this evidence, is in no way to be taken by you as a conclusive determination that such a conspiracy did in fact exist, and that any one or more of these defendants were participants in that conspiracy.)

Query - are the enumerated common law or statutory crimes?

See State v. Butler, 27 N.J. 560, 588 (1958)

State v. Blinsinger, 114 N.J. Super. 318 (App. Div. 1971)

1. State v. O'Brien, 136 N.J.L. 118 (1947).
2. State v. Lennon, 3 N.J. 337 (1949).
3. State v. Carbone, 10 N.J. 329 (1952).
4. State v. Oats, 32 N.J. Super. 435 (App. Div. 1954).
5. State v. Dennis, 43 N.J. 418 (1964).
6. U.S. v. Natale, 250 F. Supp. 381 (1966).

7. State v. Carroll, 51 N.J. 102 (1968).

8. State v. Moretti, 52 N.J. 182 (1968).

9. State v. Farinella, ____ N.J. Super. ____ (App. Div. 1977).

It should be noted that if a factor unknown to the conspirators makes it impossible for them to complete their intended crime, this in no way lessens the degree of culpability involved in the criminal combination.

State v. Moretti, 52 N.J. 182, 187 (1968)

Essential elements of statutory crime of "conspiracy" are the criminal agreement and an overt act in furtherance thereof.

State v. Moretti, 97 N.J. Super. 418, 421 (App. Div. 1967)

When uncorroborated testimony of co-conspirator is offered to prove conspiracy, issue before jury is one of credibility and it is up to jury to determine what weight should be attributed to it.

State v. Burgess, 97 N.J. Super. 428, 435 (App. Div. 1967)

State may not carve up single conspiracy into smaller conspiracies for purposes of multiple prosecutions.

State v. Ferrante, 111 N.J. Super. 299, 303 (App. Div. 1970)

Gist of offense of conspiracy is the criminal agreement which may be established by inferences drawn from the circumstances. Do not need direct contact with the parties.

State v. Yormark, 117 N.J. Super. 315, 330 (App. Div. 1971)

"A conspiracy ... has generally been defined ... as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

State v. Collins, 120 N.J. Super. 48, 50 (Law Div. 1972)

It is plain and therefore reversible error even without an objection from defendant's counsel, for the trial judge to fail to instruct the jury that out-of-court declarations of the defendant's alleged co-conspirators which were not made in the defendant's presence and which inculpated defendant are inadmissible and should not be considered as to the defendant's guilt unless and until the jury finds on the basis of other evidence the defendant's participation in the conspiratorial scheme.

U.S. v. Rodrigues, 491 F. 2d 663 (3rd Cir. 1974)

"This Court has held that where a conspiracy is shown to exist, the acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against any other conspirator. The rule is applicable where it is charged that a crime was committed in pursuance of a conspiracy, whether or not the indictment contains a count for such conspiracy." State v. Louf, 64 N.J. 172, 177 (1973)

Approved: 9/1/76

2.123 CONTRIBUTING TO DELINQUENCY OF A CHILD

(Defendant not having custody or control)

This defendant stands before you charged with the crime of contributing to the delinquency of a child. The state charges that (defendant) did on or about ... (set forth facts of the case).

The statute which defendant is charged with violating (2A:96-4) reads in pertinent part, as follows:

"[Any] person ... who by any ... willful act, encourages, causes or contributes to the child's delinquency", is guilty of a crime. The law defines a "child" for the purposes of this statute, as being any person who is under the age of eighteen years at the time of the offense.

The state must prove that (child) was in fact under eighteen. The fact that the child may have appeared to be eighteen years of age or over, is not a defense to the charge.

The state must also prove that the willful act or conduct of the defendant encouraged or had a tendency to cause the child's delinquency or resulted in the child's becoming or remaining delinquent. It is not necessary for the state to prove that defendant's conduct actually resulted in the child becoming a delinquent. A delinquent child is one who engages in an illegal or immoral act: that is, an act which

either is in violation of the law or which is not consistent with good morals.

By willful is meant an intentional and knowing act, one which is purposeful.

It is no defense to the charge that the child may have consented to the act or conduct of the defendant.

State v. Blount, 60 N.J. 23 (1972)

State v. Montalbo, 33 N.J. Super. 462 (Hudson Co. Ct. 1954)

State v. Raymond, 74 N.J. Super. 434 (App. Div. 1962)

State v. Norflett, 67 N.J. 268 (1975)

State v. Bowen, ____ N.J. Super. ____ (App. Div. 1977) (a petition for certification has been filed by defendant)

Approved: 9/1/76

2.124 DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCE

The pertinent part of the statute upon which this indictment is based, reads as follows:

N.J.S.A. 24:21-19A (1)

> Except as authorized by this act, it shall be unlawful for any person:
> To *** distribute *** a controlled dangerous substance.

The various kinds of substances are defined in another part of our Controlled Dangerous Substances Act. (Heroin) is a dangerous substance proscribed by the statute. (The defendant does not claim legal authorization, so the exceptions in the statute are not applicable in this case).

The statute, read in conjunction with this indictment, discloses the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant of this charge. They are as follows:

1. (S-1) in evidence is (heroin).

2. The defendant distributed the (heroin) to (names) on (date).

"Distribute" means to deliver, that is, the actual transfer (constructive or attempted)[1] from one person to another of a controlled dangerous substance.

3. Defendant intended to deliver or distribute the (heroin) to (name) knowing what he delivered was in fact (heroin).

---

1 To be used where appropriate

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find unlawful distribution on the part of the defendant you must first find intent, that is, that he intended to distribute the (heroin). And, in addition to intent, distribution requires knowledge, that is, knowledge by the defendant of the character of that which he allegedly distributed.

Remember that both intent and knowledge are conditions of the mind which cannot be seen. It is not necessary for the State to prove the existence of such mental states by direct evidence such as a statement by the defendant that he had such intent and knowledge. Intent and knowledge as separate propositions of proof do not commonly exist. They must ordinarily be discovered as other mental states are from circumstantial evidence, that is by reference to the defendant's conduct, words or acts and all the surrounding circumstances.

NOTE: If possession is an element, see model charge on Possession (4.251).

NOTE: Mens rea is not an element of the offense charged. State v. Gibson, 92 N.J. Super. 397 (App. Div. 1966).

NOTE: See the following cases if the issue of merger is raised: State v. Jester, 68 N.J. 87 (1975); State v. Davis, 68 N.J. 69 (1975); State v. Ruiz, 68 N.J. 54 (1975); State v. Williams, 68 N.J. 54 (1975); State v. Land, 136 N.J. Super. 354 (App. Div. 1975).

NOTE: See N.J.A.C. 8:65-10 for the schedule of C.D.S.

Approved: 9/1/76

2.125 UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE

The indictment reads in pertinent part as follows:

(Read indictment.)

The pertinent part of the statute on which this indictment is based reads as follows:

> N.J.S.A. 24:21-20.
>
> "It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance * * *."

The various kinds of drugs and dangerous substances are defined in another section of our drug law (Controlled Dangerous Substances Act) and that section includes the drug named in the indictment. The jury is thus instructed that (heroin, marijuana, etc.) is a controlled dangerous substance (narcotic drug) proscribed by the statute.

The statute read in conjunction with this indictment discloses the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant of said charge.

It is the burden of the State to prove:

(1) That exhibit _____ is (heroin, marijuana, etc.);

(2) That defendant knew exhibit _____ was (heroin, marijuana, etc.);

(3) That defendant possessed or obtained exhibit _____.

I will define some of the terms used in the elements of the crime.

To obtain means to acquire, to get, to procure.

Intentionally means a purpose to accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing.

Knowingly simply means with knowledge of what one is doing.

The knowledge required by law may be shown by circumstantial evidence; it may be proved by the circumstances attending the possession and any other fact or circumstance which the jury finds would demonstrate the necessary knowledge.

CHARGE DEFINITION OF POSSESSION

(Actual - Constructive - Joint) - see Model Criminal Charge 4.251

State v. Labato, 7 N.J. 1,7 (1951)
State v. Salernitano, 27 N.J. Super. 537, 542-543 (App. Div. 1953)
State v. Reed, 34 N.J. 554 (1961)
State v. Brown, 67 N.J. Super. 450 (App. Div. 1961)
State v. Campisi, 42 N.J. Super. 138 (App. Div. 1956), reversed on other grounds, 23 N.J. 513 (1957)
State v. Puckett, 67 N.J. Super. 365 (App. Div. 1960), aff'd 34 N.J. 574 (1961)
State v. Thomas, 105 N.J. Super. 331, 335 (App. Div. 1969) (dissenting opinion)
State v. Kimbrough, 109 N.J. Super. 57 (App. Div. 1970)
See Annotation, "What constitutes 'possession' of a narcotic drug proscribed by §2 of the Uniform Narcotic Drug Act," 91 A.L.R. 2d 810 (1963)
Federal Jury Practice and Instructions, §10.09, "Possession"--Defined
California Jury Instructions, No. 41

NOTE:

See the following cases if the issue of merger is raised:

State v. Jester, 68 N.J. 87 (1975); State v. Davis, 68 N.J. 69 (1975); State v. Ruiz, 68 N.J. 54 (1975); State v. Williams, 68 N.J. 54 (1975); State v. Land, 136 N.J. Super. 354 (App. Div. 1975)

NOTE: See N.J.A.C. 8:65-10 for the schedule of C.D.S.

Approved: 9/1/76

2.126 POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED DANGEROUS SUBSTANCE

The pertinent part of the statute upon which this indictment is based, reads as follows:

> N.J.S.A. 24:21-19A(1)
>
> Except as authorized by this act, it shall be unlawful for any person:
> ***to possess or have under his control with intent to distribute***a controlled dangerous substance.

The various kinds of substances are defined in another part of our Controlled Dangerous Substances Act. (Heroin) is a dangerous substance proscribed by the statute. (The defendant does not claim legal authorization, so the exceptions in the statute are not applicable in this case).

The statute, read in conjunction with this indictment, discloses the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant of this charge. They are as follows:

1. S-1 in evidence is (heroin).
2. The defendant possessed, or had under his control (heroin).
3. The defendant knew what it was he possessed.
4. The defendant intended to possess it.
5. The defendant possessed the (heroin) with the intent to distribute it.

(REFER TO MODEL CHARGE ON POSSESSION (4.251)
AND USE THOSE PORTIONS WHICH APPLY
TO YOUR CASE)

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find possession on the part of the defendant you must first find intent, that is, that he intended to exercise control over the (heroin). Andin addition to intent, possession requires knowledge, that is, knowledge by the defendant of the character of that which he possessed. It is possible to possess something without knowing it, but such possession is not possession within the meaning of the law.

Remember that both intent and knowledge are conditions of the mind which cannot be seen. It is not necessary for the State to prove the existence of such mental states by direct evidence such as a statement by the defendant that he had such intent and knowledge. Intent and knowledge as separate propositions of proof do not commonly exist. They must ordinarily be discovered as other mental states are from circumstantial evidence, that is by reference to the defendant's conduct, words or acts in all the surrounding circumstances.

The final element of the charge is that the defendant possessed the (heroin) with the intent to distribute it to others.

Distribute means to deliver, that is, the actual transfer (constructive or attempted)[1] from one person to another of a controlled dangerous substance.

As I indicated previously, intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. It is very rare that intent is proven by witnesses who can testify that an accused said he had a certain intent, when he engaged in a particular act. This intention may be gathered from his acts, his conduct, from all he said and did at the particular time and place, and from all of the surrounding circumstances.

You may consider the quantity of the (heroin) together with all the other evidence in the case, to aid you in your determination of the element of intent to deliver.

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1 To be used where appropriate

NOTE: Mens rea is not an element of the offense charged.

State v. Gibson, 92 N.J. Super. 397 (App. Div. 1966)

NOTE: See the following cases if the issue of merger is raised: State v. Jester, 68 N.J. 87 (1975); State v. Davis, 68 N.J. 69 (1975;) State v. Ruiz, 68 N.J. 54 (1975); State v. Williams, 68 N.J. 54 (1975); State v. Land, 136 N.J. Super. 354 (App. Div. 1975)

NOTE: See N.J.A.C. 8:65-10 for the schedule of C.D.S.

Approved: 9/1/76

2.127 CRUELTY TO CHILD

(This charge deals with section (a) of the statutes referred to as Cruelty to Child. See the Statute for other sections not necessarily involving corporal punishment.)

The defendant is charged in the ____ count of this indictment with the offense of Cruelty to Child under N.J.S.A. 9:6-3. That statute in its pertinent part reads as follows:

> Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child ... shall be deemed to be guilty of a ... [crime]... .

Under N.J.S.A. 9:6-1 the term Cruelty to a Child is defined as follows:

> * * *
>
> Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child; (e) or exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child.

This law does not make the infliction of corporal, that is, physical punishment upon a child, in and of itself a crime; but rather it prohibits the unnecessarily severe infliction of corporal, that is, physical punishment.

A reading of the indictment together with the statute will indicate the elements that the State must prove beyond a reasonable doubt. They are as follows:

1. The defendant having custody or control over _____ did willfully and intentionally inflict punishment upon _____, a child of _____ years of age.

2. That there was no necessity for the punishment inflicted.

3. That the punishment was unnecessarily severe.

(HERE DEFINE INTENT AND WILLFULNESS)
SEE NOTE 4

(IF THE EVIDENCE IN THE CASE WARRANTS IT, "ACCIDENT" MAY BE DEFINED IN THE FOLLOWING MANNER)

(If the act is unintentional or accidental it is not a criminal offense. An accident is something which happens unexpectedly wholly without design, and completely by chance. It is an unforeseen event, misfortune, act, or omission which is not the result of negligence or misconduct. Where a person commits an act or makes an omission through misfortune or by accident under circumstances that show the act was not intentionally or purposely committed or the result of culpable negligence, he does not thereby commit a crime.)

This Statute does not prohibit reasonable punishment of a child by a parent or a person having care, custody or control, but is concerned with punishment that is not reasonably called for and is unreasonably severe.

1. Richardson v. State Board of Control, 98 N.J.L. 690 (Sup. Ct. 1923), aff'd, 99 N.J.L. 516 (E. & A. 1924)

2. State v. Burden, 126 N.J. Super. 424 (App. Div.1974), certif. den., 65 N.J. 282 (1974).

3. The complaint for violating this Act must set forth with specificity the act or acts done by the defendant constituting Cruelty toward Children. See Myslewitz v. Sullivan, 102 N.J.L. 61 (Sup. Ct. 1925).

4. In charging neglect, intent to harm or evil intent or bad motive is not required on part of defendant. Further, "willful" is intentionally or purposely committed as distinguished from actions which are inadvertent or accident. See State v. Rivera, 133 N.J. Super. 453 (App. Div. 1975). It is suggested in an appropriate case to refer to N.J.S.A. 9:6-1 for the definition of an abused child.

Approved: 9/1/76

2.130 DEATH BY RECKLESS DRIVING

(N.J.S.A. 2A:113-9)

The pertinent provisions of the statute (N.J.S.A. 2A:113-9) on which the charge made against the defendant is based states that: "Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of [a crime]".

In order for the defendant to be convicted of the crime charged in this case, the State must first prove to your satisfaction beyond a reasonable doubt:

1. That he operated his motor vehicle in such a manner as to constitute a reckless indifference to and disregard of human life; and

2. That he caused the death of (the decedent named in the indictment) by careless and heedless driving in wanton disregard of the rights or safety of others.

To establish that the defendant's conduct was wanton, it is incumbent upon the State to prove to your satisfaction beyond a reasonable doubt that with knowledge of existing conditions or circumstances, or both, and conscious from such knowledge that there was a high degree of probability of producing harm from his conduct, and with reckless indifference to the consequences, the defendant consciously and intentionally did some wrongful

act in the operation of his vehicle, or omitted to discharge some duty in the operation of his vehicle, which resulted in the death of the decedent.

It is not necessary for the State to prove that the defendant showed ill will toward, or a positive intent to injure, the decedent, or any other person, in order to establish that a motor vehicle was driven by the defendant in willful or wanton disregard of the rights or safety of others.

If you find that the defendant did not drive his motor vehicle with reckless indifference, or that he did not know of any circumstances or conditions which would make him conscious of a high degree of probability that his operation of the motor vehicle would produce harm, injury or death to the decedent, or anyone else, then you must find the defendant not guilty.

The defendant in driving his automobile at the time in question was under a duty to exercise such care and skill and have his car in such reasonable control as a reasonably prudent person would, under the conditions existing at the time of the collision.

In addition, the defendant was under a duty to observe the provisions of the Motor Vehicle and Traffic Act of this State.

(Here insert the provision or provisions of the Motor Vehicle and Traffic Act alleged to have been violated, e.g.: One of the sections of this Act provides in part that:

> "No driver of a vehicle ... shall enter upon or cross an intersecting street marked with a 'stop' sign unless he has first brought his vehicle ... to a complete stop at a point within 5 feet of the nearest crosswalk or stop line marked upon the pavement at the near side of the intersecting street and shall proceed only after yielding the right of way to all traffic on the intersecting street which is so close as to constitute an immediate hazard. ..."
> (R.S. 39:4-144)

It is the intent of this section of the Motor Vehicle and Traffic Act to have the motorist bring his car to a full stop for the very purpose of compelling him to look carefully for oncoming traffic as he enters and crosses the intersecting street.

There is testimony produced by the State that the defendant passed a stop sign (location) without stopping his car and proceeded into the intersection of and Streets, where the collision occurred.)

Now the mere neglect of the defendant to use the care which I have charged you he was under an obligation to use, and the mere neglect or failure to observe a provision of the Motor Vehicle and Traffic Act are not sufficient to form the basis of a conviction under this indictment. They are circumstances to be considered together with all the other facts and circumstances of the case. The defendant's neglect must be more than mere carelessness or negligence. It must, under all the facts and circumstances, go to such an extent, as I have indicated to you, as to constitute and evince a reckless indifference to and disregard of human life.

NOTE:

If it is alleged that the decedent was contributorily negligent, the following additional paragraphs are suggested:

The defendant says that the decedent was contributorily negligent. Contributory negligence may be defined as the failure to exercise, in the given circumstances, that degree of care for one's own safety which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.

Contributory negligence by the decedent is not a defense as in civil damage suits. However, evidence of negligence on the part of the decedent is admissible in this case and should be considered by the jury on the question of whether the death of the decedent was due to criminal negligence on the part of the defendant (that is, by the defendant driving a vehicle carelessly and heedlessly, in wanton disregard of the rights or safety of others) or to some other cause. If the defendant is shown beyond a reasonable doubt to have been guilty of the acts prohibited by the statute, resulting in the death of the decedent, it matters not that the decedent would have escaped the fatal consequences had he, himself, not been negligent. An accused under this statute

may not avoid the consequences of his own wrong by showing the negligence of the decedent.[1]

If, however, you find from all of the evidence that the decedent's conduct at the time of the accident was the efficient producing cause of his death, you must find the defendant not guilty of the crime charged in the indictment even though he was driving at the time in willful or wanton disregard of the rights of the public generally.[2]

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1. State v. Kellow, 136 N.J.L. 1, 4 (Sup. Ct. 1947), aff'd, 136 N.J.L. 633 (E. & A. 1948)

2. State v. Shoopman, 20 N.J. Super. 354, 359-360 (App. Div. 1952), aff'd, 11 N.J. 333 (1953)

NOTE:

(When appropriate, the following may be included:)

The offense condemned by the statute may be committed by the driver of a motor vehicle who causes the death of another when there inheres in his driving the high probability of causing harm because of conditions known to him which actually impair, or potentially have the capacity to impair, his faculties for vigilance and care.

NOTE:

If the defendant claims that he was blinded by headlights of cars driven in the opposite direction, the following instruction is suggested:

The defendant claims that he was blinded by the headlights of cars coming in the opposite direction. No man is entitled to operate an automobile through a public street blindfolded. A person whose vision is admittedly destroyed is under a duty to stop his car and endeavor to adjust his means of vision so that his vision might be restored. If, instead of doing this, the defendant took the chance of finding the way clear and for that reason ran into the deceased, he cannot be excused by the mere fact that the oncoming headlights blinded him. If you find as a fact that the defendant was blinded by the oncoming headlights at or near the scene of the accident and that he, nevertheless, failed to stop or slow down and endeavor to adjust his means of vision so that it was restored, then those would be facts to be considered by you together with all of the evidence in the case in deciding whether this defendant is guilty of the crime with which he is charged. [1]

---

1. State v. Kellow, 136 N.J.L. 1, 5 (Sup. Ct. 1947) aff'd, 136 N.J.L. 633 (E. & A. 1948)

Statute: N.J.S.A. 2A:113-9

Cases: In Re Lewis, 11 N.J. 217 (1953); State v. Donley, 85 N.J. Super. 127 (App. Div. 1964); State v. Shoopman, 20 N.J. Super. 354 (App. Div. 1952), aff'd, 11 N.J. 333 (1953); State v. Oliver, 37 N.J. Super. 379 (App. Div. 1955); Cresse v. Parsekian, 81 N.J. Super. 536, 545 (App. Div. 1963),aff'd, 43 N.J. 326 (1964).

NOTE: "'Willful' and 'wanton' have substantially the same meaning. Indeed, the phrase 'willful or wanton' might well be read 'willful and wanton.'" State v. Donley, supra, at 85 N.J. Super. p. 133.

" ... True, conduct which is willful or wanton, unlike conduct which is merely negligent, does import intent. 38 Am.Jur., Negligence, sec. 48, p. 692. However, the element of intent to harm is supplied by a constructive intention as to consequences, which entering into the intentional act which produces harm, namely, the driving of the vehicle, the law imputes to the actor, so that conduct which otherwise would be merely negligent becomes, by reason of reckless disregard of the safety of others, a willful or wanton wrong. See King v. Patrylow, 15 N.J. Super. 429 (App. Div. 1951). The emphasis is upon the reckless indifference to consequences of the intentional act of

driving the motor vehicle in the face of known circumstances presenting a high degree of probability of producing harm. State v. Hedinger, 126 N.J.L. 288 (Sup. Ct. 1941), affirmed 127 N.J.L. 564 (E. & A. 1942); State v. Linarducci, 122 N.J.L. 137 (Sup. Ct. 1939), affirmed 123 N.J.L. 228 (E. & A. 1939); State v. Gooze, 14 N.J. Super. 277, 286 (App. Div. 1951); Annotation, 160 A.L.R. 515." In Re Lewis, supra, at 11 N.J. pp. 221-222.

" ... while the contributory negligence of the deceased is not a defense to the indictment, yet his conduct at the time of the accident may be shown and if that conduct is found by the jury to have been the efficient, producing cause of the death, the defendant is entitled to an acquittal even though he was driving at the time in willful or wanton disregard of the rights of the public generally. State v. Kellow, 136 N.J.L. 1 (Sup. Ct. 1947), affirmed, 136 N.J.L. 633 (E. & A. 1948); State v. Oliver, 107 N.J.L. 319 (E. & A. 1931)." State v. Shoopman, supra, at 20 N.J. Super. pp. 359-360.

2.140 EMBEZZLEMENT

(N.J.S. 2A:102-5)

The statute (N.J.S. 2A:102-5) upon which the charge set forth in the indictment is predicated, insofar as it is pertinent here, states that:

> Any (employee), (agent), (consignee), (factor), (bailee), (lodger) [or] (tenant) who embezzles or, with intent to defraud, takes money or receives, retains or appropriates to his own use or the use of another, any property or the proceeds of the sale of the same, or any part thereof, belonging to his (employer), (principal), (consignor), (bailor) [or] landlord, is guilty of a violation of the law.

Embezzlement is the intentional and fraudulent appropriation of the property or money of another by a person into whose hands it has lawfully come or to whom it has been entrusted.[1.]

In order to justify a conviction for the crime charged in the indictment, the State must first prove to your satisfaction beyond a reasonable doubt five essential elements. These five elements are:

First: That the particular relationship between (name of the complainant) and the defendant, as charged in the indictment,

during the period mentioned in the indictment, was that of (state the alleged relationship), that is, that the defendant was the (employee) (agent) (consignee) (factor) (bailee) (lodger) [or] (tenant) of (the complainant). 2.

(An employee is a person who works for a salary, wages or commissions for an employer and is engaged in services for his employer.) 3.

(An agent is a person authorized by another, called a principal, to act for him.) 4.

(A consignee is a person to whom goods are shipped for sale.) 5.

(A factor is a commercial agent, employed by a principal to sell merchandise consigned to him for that purpose, for and in behalf of the principal, but usually in his own name, being intrusted with the possession and control of the goods, and being remunerated by a commission.) 6.

(A bailee is a person to whom personalty has been delivered for some particular purpose, or on mere deposit, under a mutual understanding with the person making the delivery that after the purpose has been

fulfilled the personalty shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.) 7.

(A lodger is an occupant who has mere use without actual or exclusive possession; a tenant of part of another's house.) 8.

(A tenant is a person who has the temporary use and occupation of real property owned by another person (called the "landlord,") the duration and terms of his tenancy being usually fixed by an instrument called a lease.) 9.

Second: The (money) (property) (describe) alleged to have been embezzled must have been the (money) (property) of (the complainant) while the defendant had possession of it.

Third: The (money) (property) must have been received by or entrusted to the defendant by virtue of his relation to (the complainant). In this case the (money) (property) must have been received by or entrusted to the defendant by reason of (here state relation of defendant to complainant).

Fourth: There must be an intentional and fraudulent appropriation by the defendant to his own use of the (money)

(property) which he, the defendant, received or which was entrusted to him.

It is not essential that the State prove the exact amount of money wrongfully appropriated. It may be more than or a portion of the amount set forth in the indictment.[10.]

Fifth: The conversion, that is, the wrongful appropriation by the defendant to his own use of the (money) (property) must have been done with intent to defraud.

As to what is an intent, I charge you that it is a condition of the mind which cannot be seen, and can only be determined by reference to conduct or from inferences from conduct, words or acts. It means the purpose to do something or resolve to do a particular act or to accomplish a certain thing. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he allegedly engaged in a particular act. His intention may be gathered from his acts and his conduct, if any, and from all of the surrounding circumstances that existed at the time and place.

Intent (See Model Charges) as a separate proposition for proof does not commonly exist. It must ordinarily be discovered, as other mental states are, in the evidence of the defendant's conduct in the surrounding circumstances.[11.]

1. State v. Bobbins, 35 N.J. Super. 494, 497 (App.Div. 1955), aff'd, 21 N.J. 338 (1956), appeal dismissed 352 U.S. 920, 77 S. Ct. 220, 1 L.Ed. 2d 157; State v. Daly, 38 N.J. 1, 7 (1962); State v. Hubbs, 70 N.J. Super. 322, 329 (App. Div. 1961); State v. Butler, 134 N.J.L. 122 (Sup.Ct. 1946).

2. State v. Hubbs, supra, at 70 N.J. Super. pp. 332-333.

3. Black's Law Dictionary, 4th Ed. (1951) p. 617.

4. Id., p. 85.

5. Id., p. 380.

6. Id., p. 707.

7. Id., p. 178; 9 Williston on Contracts, 3rd Ed., Sec. 1030, pp. 875-876; State v. Carr, 118 N.J.L. 233 (E. & A. 1937).

8. Black's Law Dictionary, supra, at p. 1091.

9. Id., p. 1635.

10. State v. Hubbs, supra, at 70 N.J. Super. p. 330.

11. State v. Costa, 11 N.J. 239, 246-247 (1953).

Texts:

I Schlosser, Criminal Laws of New Jersey, 3rd Ed. (1970) Sections 42:11 and 42:12, pp. 483-484.

II Wharton's Criminal Law and Procedure (1957) Chapter 19, pp. 187-238.

SUPPLEMENT TO MODEL CHARGE ON

EMBEZZLEMENT

(N.J.S. 2A:102-5)

NOTE:

In State v. Bobbins, 35 N.J. Super. 494, 497 (App. Div. 1955), aff'd, 21 N.J. 338 (1956), appeal dismissed 352 U.S. 920, 77 S. Ct. 220, 1 L.Ed. 2d 157, Judge Francis (now Justice) in his Opinion for the Appellate Division, referring to the statute (N.J.S. 2A:102-5) and the word "embezzles" contained therein, points out (at 35 N.J. Super. p. 497):

> "The suggestion is that use of the word 'embezzles,' which did not signify a crime at common law, without specific definition as to what is being made criminal, renders it necessary for the public to speculate about the nature and elements of the crime. Further it is said that in the context 'embezzles' stands alone disconnected from the remainder of the sentence, so that no answer is provided for such questions as: 'Embezzles what?' and 'Embezzles from whom?'
>
> "We find no legal merit in these criticisms. Although the construction and perhaps the punctuation of the sentence could be improved, the implication is plain so far as the present case is concerned. An employee, agent, consignee, factor, bailee, lodger or tenant is guilty of embezzlement if (a) he embezzles money belonging to his employer, principal, consignor, bailor or landlord, or (b) if with intent to defraud he takes money belonging to his employer, principal, consignor, bailor or landlord that has come into his possession lawfully.
>
> "Moreover the connotation of the word 'embezzles' is obvious. It has had a settled significance in the law from the time of the first judicial declaration that conversion or misappropriation of money or property of an employer

> or principal by a servant or agent which had been entrusted to him by another, did not constitute common-law larceny. Since then embezzlement has meant generally the intentional and fraudulent appropriation of the property or money of another by a person into whose hands it had lawfully come or to whom it had been entrusted. State v. Carr, 118 N.J.L. 233 (E. & A. 1937); State v. Woodward, 99 N.J.L. 49 (Sup.Ct. 1923); State v. Egan, 84 N.J.L. 701 (E. & A. 1913); 29 C.J.S., Embezzlement, § 1; 2 Wharton, Criminal Law (12th ed. 1932), p. 1568, § 1258; 2 Burdick, The Law of Crime (1946), § 562; Webster's New International Dictionary.* * *"

NOTE: Additional definitions suggested:

The word "fraudulent" means that the appropriation of the property or money of another was "done, made, or effected with a purpose or design to carry out a fraud." Black's Law Dictionary, 4th Ed.(1951) p. 789.

The word "personalty" means "personal property; movable property; chattels." Black's Law Dictionary, 4th Ed. (1951) p. 1301.

NOTE:

The former State Supreme Court in State v. Reynolds, 65 N.J.L. 424 (Sup.Ct. 1900) pointed out:

> "If there is any difference, legally, between fraudulently converting and converting with intent to defraud, it is not discernable * * *." (65 N.J.L. at p. 427)

And, at 65 N.J.L. p. 431 stated:

> "It should be said, however, that a demand and refusal does not of itself, in any case, establish fraudulent conversion, or conversion by a defendant to his own use, but that it is only evidence to go to the jury upon the question of the defendant's fraudulent conversion."

Approved: 9/1/76

2.141 ESCAPE (N.J.S.A. 2A:104-6)

The defendant is charged with the crime of escape. By definition escape is the intentional act of departing from or getting free of lawful custody or control.

Under our New Jersey Statute N.J.S.A. 2A:104-6 different types of escape are specifically provided for:

> "Any person imprisoned or detained in a place of confinement, or being in the lawful custody or control of a penal or correctional institution or of any officer or other person, upon any charge, indictment, conviction or sentence for any crime, or upon any writ or process in a civil action or proceeding, or to await extradition, who by force or fraud escapes or attempts to escape from such place of confinement or from such custody or control, or leaves the building or grounds of his place of confinement without the consent of the officer in charge, is guilty of a[crime]."

Therefore, in order to convict the defendant of escape the State must prove each of the following elements beyond a reasonable doubt:

(1) That the defendant was imprisoned or detained in a place of confinement (or that the defendant was in the physical custody or control of a correctional institution or of an officer); and,

(2) That the defendant was under a charge, indictment, conviction or sentence at the time (or that the defendant was being held pursuant to a civil writ or other process) (or that the defendant was awaiting extradition); and,

(3) That the defendant intentionally departed from his place of confinement (or, broke loose or got free from the custody or control of an officer) without the consent of the officer in charge.

In determining whether or not the State has proven each of the elements of this crime you should be guided by the following principles of our criminal law governing escape:

(Charge those principles that are applicable to the evidence in the case)

(a) An escape takes place when the defendant obtains more liberty than the law allows although he remains in custody. For example, if a prisoner were to leave the area assigned to him, such as his cell, and got outside into a locked corridor he has escaped even though he still does not have his complete freedom.

(b) The escape must be intentional. You would not have escape if the act of departure was done through mistake or ignorance.

(c) There can be no escape if it is established that the defendant was being held illegally, that is, if there was no valid charge made against him or no valid sentence imposed upon him. Of course, a defendant is guilty of escape, even though the defendant claims he is innocent, so long as a valid charge was taken by a proper official or a proper sentence imposed by a Judge.

(d) It is not a valid defense to the crime of escape for the defendant to contend that the terms or conditions of his custody or confinement were improper, that is, that the food was bad, the cell unsanitary, or those in whose custody he was placed were visiting improper punishment upon him.

Note: The defense of duress in prison escape cases has been broadened to include situations where less than the traditional "gun to the head immediacy" test is present. See People v. Unger, 33 Ill. App. 3d 770, 338 N.E.2d 442 (1975).

(e) It is no defense to the crime of escape that the defendant did not get very far or that he was free of his restraint only for a short period of time.

(f) When dealing with the custody of a defendant by a police officer - as distinguished from a defendant confined in a jail - the State does not have to prove that the defendant was handcuffed or chained. It is enough that the defendant understood that he was being detained by the officer.

(The standard charge as to attempt should be given if that situation is presented by the evidence).

Note: State v. Walker, 131 N.J. Super. 547 (App. Div. 1974) held the element of force or fraud referred to in the statute is not a necessary element under N.J.S.A. 2A:104-6 (the general escape statute) nor under N.J.S.A. 30:8-53 (escape from county work release or vocational training release programs).

Approved: 4/18/77

2.142-A EXTORTION BY A PRIVATE PERSON
(Threat to accuse of a crime)

Under this indictment the defendant is charged with violating the provisions of our Statute N.J.S.A.2A:105-3(a) which provides in its pertinent parts as follows:

> "Any person who orally or by knowingly sending or delivering any letter or writing, whether signed or unsigned, or signed with a fictitious name:
>
> (a) Threatens to accuse any person of an indictable crime, with intent to extort any money or valuable thing.... is guilty of a crime."

Thus, under this Statute, in order to convict the defendant, the State has the burden of proving, beyond a reasonable doubt, the following elements of this offense:

(1) That the defendant orally (or, knowingly sent or delivered any letter or writing, whether signed or unsigned, or signed with a fictitious name,) threatened (threatening) to accuse _____ of committing _____ (insert crime charged); and,

(2) That the said threat was made with intent to extort money or anything of value.

I charge you that _____ is an indictable crime under our Statutes.

Members of the jury, the word "extort" means to compel or coerce, unlawfully, payments of money or anything of value by means of threats of injury to the person, property or reputation of another. Whether money or anything of value was actually received, as a result of the threats made, is immaterial.

Concerning the first element, it is necessary that you find that a threat was made that would create alarm in the person to whom it was made. The test is whether the threat, in itself, or as affected by all the surrounding circumstances, is such that it would reasonably be regarded by the ordinary person as requiring his or her compliance with the demand.(1)

(Discuss the circumstances)

No precise words are necessary in order to constitute a threat in violation of this Statute. Such a threat may be direct, or indirect, and the circumstances under which the threat is made and the relations between the parties may be taken into consideration.(2) If written, it is immaterial whether the threat was signed or unsigned, or signed with a fictitious name.

The crime is completed by either an oral or written demand for money or anything of value. It is also immaterial whether the facts which the defendant threatens to reveal or disclose are true or false.(3)

An essential element of this crime is the intent of the defendant to extort money or anything of value at the time of making the threat.

(Charge "INTENT")

Ladies and gentlemen, if you find that the threat (or threats) was (were) made merely to annoy or harass, with no intent to extort money or other thing of value, the offense is incomplete and the defendant must be acquitted.

NOTES: (1) State v. Morrissey, 11 N.J. Super. 298, 302 (Law Div. 1951)
(2) Wharton Criminal Law, § 1398
(3) Wharton Criminal Law & Procedure, § 1397

Approved: 4/18/77

2.142-B EXTORTION BY A PRIVATE PERSON
(Threat to injure the person or property of another)

Under this indictment the defendant is charged with violating the provisions of our Statute N.J.S.A.2A:105-3(b) which provides in its pertinent parts as follows:

> "Any person who orally or by knowingly sending or delivering any letter or writing, whether signed or unsigned, or signed with a fictitious name:
>
> (b) Demands money or other valuable thing under threat of injury to person or property.... is guilty of a crime."

Thus, under this Statute, in order to convict the defendant, the State has the burden of proving, beyond a reasonable doubt, the following elements of this offense:

(1) That the defendant orally (or, knowingly sent or delivered any letter or writing, whether signed or unsigned, or signed with a fictitious name) threatened (threatening) injury to the person or property of _____ (insert name of victim); and

(2) That at the time of making said threat the defendant demanded money or other valuable thing.

Concerning the first element, it is necessary that you find that a threat was made that would create alarm in the person to whom it was made. The test is whether the threat, in itself, or as affected by all the surrounding circumstances, is such that it would reasonably be regarded by the ordinary person as requiring his or her compliance with the demand.[1]

(Discuss the circumstances)

No precise words are necessary in order to constitute a threat in violation of this Statute. Such a threat may be direct, or indirect, and the circumstances under which the threat is made and the relations between the parties may be taken into consideration.[2] If written, it is immaterial whether the threat was signed or unsigned, or signed with a fictitious name.

Coupled with the threat there must be an oral or written demand for money or anything of value. Whether money or anything of value was actually received as a result of the demand and threats made, is immaterial.

An essential element of this crime is the intent of the defendant to unlawfully obtain money or anything of value by threats of injury to the person or property of another.

(Charge "Intent")

Ladies and gentlemen, if you find that the threat (or threats) was (were) made merely to annoy or harass, with no intent to obtain money or other thing of value, the offense is incomplete and the defendant must be acquitted.

NOTES: (1) State v. Morrissey, 11 N.J. Super. 298, 302 (Law Div. 1951)
(2) Wharton Criminal Law, § 1398

Approved: 4/18/77

2.142-C EXTORTION BY A PRIVATE PERSON
(Sending or Delivering
Threatening Letters)

Under this indictment the defendant is charged with violating the provisions of our Statute N.J.S.A.2A:105-3 which reads in its pertinent parts as follows:

> "Any person who knowingly sends or delivers any letter or writing, whether signed or unsigned, or signed with a fictitious name threatening to injure, maim, wound, kill or murder any person, or to burn, destroy or injure his property, or to do any civil injury to any person or to his property, though no money or other valuable thing be demanded.... is guilty of a crime."

Thus, under this section of the Statute, the State has the burden of proving, beyond a reasonable doubt, the following elements of this offense:

(1) That the defendant knowingly sent or delivered any writing, signed or unsigned, or signed with a fictitious name; and

(2) That the writing threatened to injure, maim, wound, kill or murder any person, or to burn, destroy or injure his property, or to do any civil injury to any person or his property.

To constitute an offense under this Statute, it is necessary that you find that a threat was made that would create alarm in the person to whom it was made. The test is whether the threat, in itself, or as affected by all the surrounding circumstances, is such that it would reasonably be regarded by the ordinary person as being real.[1]

No precise words are necessary in order to constitute a

threat in violation of this Statute. Such threat may be direct or indirect, and the circumstances under which the threat is made and the relations between the parties may be taken into consideration.[2]

The fact that no money or anything of value was demanded is immaterial since the crime is completed if the offender knowingly sent or delivered a threatening writing.[3]

Concerning the word "knowingly", I instruct you that knowledge may be inferred from conduct, actions, and statements, as well as from all the surrounding circumstances at the time and place in question. "Knowledge" means a conscious awareness of what one is doing.

NOTES:
(1) State v. Morrissey, 11 N.J. Super. 298, 302 (Law Div. 1951)
(2) Wharton Criminal Law, § 1398
(3) Wharton, § 1399. The character of the letter is to be determined from all the surrounding circumstances. If the meaning of the letter is ambiguous it is a jury question whether it is a threatening letter. If there is no ambiquity, it is a question for the Court.

Approved: 7/11/77

2.143 EXTORTION BY A PUBLIC OFFICIAL

N.B. State v. Savoie 67 N.J. 439 (1975). Judges should read this case thoroughly before charging juries in cases of extortion by public officials.

The crime of extortion is defined in N.J.S.A.2A:105-1 which provides as follows:

> Any judge* magistrate* or public officer* who, by color of his office, receives or takes any fee or reward not allowed by law for performing his duties, is guilty of a (crime).
>
> *N.B. Refer only to the appropriate official involved.

To sustain a violation of this statute, it must be shown by the State beyond a reasonable doubt that

(1) the defendant was a public officer; and

(2) that he intentionally took or received any money or thing of value; and

(3) that the money or thing of value taken was not due the officer under the law and that defendant knew that fact; and

(4) that the money or thing of value was taken by color of defendant's office, and I shall presently explain what that means; and

(5) that the money or thing of value was given and taken in return for the performance by the officer of his duties; in this respect it does not matter whether the taking was before or after the performance of the officer's duties as long as it was understood between the parties that

the passing of the money or thing of value was intended as payment for the performance of the duties.

A "public officer" under this statute encompasses any person who is placed within a governmental system recognized by the law of the State which either directly or by delegated authority assigns to that person the performance of certain public duties.[1-2]

By color of his office it is meant that the public officer through his official position gave others the appearance of his having authority (or apparent capability) to do or refrain from doing the act in question.[2] The service rendered (or not rendered) must be apparently or pretended to be within the official power or authority and the money (or something else of value) must be taken in such apparent or claimed authority.[3-4-5]

[N.B. If appropriate to the facts in case charge the following:

The rendition by a public officer of a service in his private capacity for which he receives or demands payment is not extortion because not made under color of office.]

In addition the public officer who receives the money (or something else of value) must understand that it is a quid pro quo (a price) for the past or future performance (or non performance) by him of his services. The services rendered must be apparently, or pretended to be, within official power or authority, and the money (or something else of value) must be taken in such apparent or claimed authority.[3-4-5]

It is imperative that the public officer intentionally accepted the money (or something else of value) and knew at the time

that he was not allowed by law to accept such money (or something else of value) for performing (or not performing) his duties.

(Define intent 4.181)

Also in reference to intent, may I further explain that it is not necessary in cases of this type for the State to prove either that the defendant was conscious of wrongdoing or guilt when he committed the incriminating act or that defendant intended to violate the criminal law. The State need only prove beyond a reasonable doubt the elements of the crime as I have explained them to you.

Just as in intent, it is not necessary that the State produce witnesses to testify that defendant said he had a certain knowledge when he engaged in a particular act. Knowledge may be proven and inferred from circumstantial evidence, including the nature of any exhibit in evidence, and by reference to defendant's conduct, words or acts, and from all of the surrounding circumstances.

It is immaterial whether the public official actually carries out the undertaking or not. It is equally criminal to accept money (or something else of value) under an understanding to perform a certain act and not to do it as it is to actually perform the agreement.

Extortion in the sense of this statute does not necessarily involve the use of threats. Extortion is the unlawful taking by any officer, by color of his office (previously explained), of any money (or something else of value) that is not due to him, or more than is due, or before it is due. The taking of money (or something else of value) need not be coercive in order to find criminal liability. There is no requirement for the State to prove that defendant demanded an illegal fee as an element of the crime of extortion as set forth in this statute.

Footnotes

1. State v. Weleck, 10 N.J. 355 (1952).

2. An official character, either de facto or de jure, is essential to the offense and the crime can be committed only by an officer. 1 Schlosser, § 44:2. The accused may be an officer of another state. State v. Barts, 132 N.J.L. 74, (Sup. Ct. 1944)

3. It does not mean that the taking must have preceded the performance of the duties and does not mean that there must have been a coercive or aggressive use of the powers of the office for the purpose of taking the money or that if the payment is after the performance of the services there must have been a definite understanding prior to the services that the money would be paid.

4. State v. Begyn, 34 N.J. 35, 47 (1961).

   N.B. - Read State v. Savoie (infra) as it modifies this case.

5. State v. Weleck, supra, at 372.

See also: State v. Gora, ___ N.J. Super. ___ (App. Div. 1977).

Approved: 6/24/75

2.144 EMBRACERY

The indictment which I have read to you is based upon N.J.S.A. 2A:103-1 which provides as follows:

> Embracery and any attempt to corrupt or influence a jury or juror, or in any way to incline a jury or juror to be more favorable to the one side than to the other by promises, persuasions, entreaties, threats, letters, money, entertainment or other sinister means; any indirect, unfair and fraudulent practice, art and contrivance to obtain a verdict, or any attempt to instruct a jury or juror beforehand at any place or time, or in any manner or way, except in open court at the trial of the cause, by the strength of the evidence, the arguments of the parties or their counsel, or the opinion or charge of the court, is a ... [crime].

Embracery is defined as an unlawful attempt to influence a juror or a jury to one side by promises, persuasions, entreaties, money, entertainment and the like.[1]

The gravamen, i.e., the gist of the offense of embracery consists of an attempt to exert corruptly an influence upon a jury or juror for the purpose of securing the favoritism of such person or persons in a case. The crime is consummate when such attempt has been made, a successful attempt not being a requisite of the offense. Guilt is incurred by the endeavor to exercise a corrupt influence; success may aggravate,

but is not a condition of the offense. In other words, the corrupt attempt is the substance of embracery, and it is immaterial whether the corrupt influence is effectual to influence the verdict.[2] To put this more simply, any attempt to influence a juror, even if unsuccessful, is embracery. The bare attempt completes the crime.[3]

The word "attempt", as used in the foregoing statute and discussion of the offense of embracery, describes any effort or essay, i.e., try to accomplish the evil purpose that the statute was enacted to prevent.[4] And it is the law of New Jersey that any person who solicits and attempts to persuade another to see and talk to trial jurors in his favor is guilty of embracery.[5]

INTENT - Model Charges 4.181

The necessary intent required in the crime of embracery is that the individual have as a purpose the wrongful or corrupt communication with a juror, that is, a purpose to subject the juror's decision to personal influences or gains rather than the principles of justice and the interest of society.[6]

Thus, the elements of the offense of embracery, each of which the State must prove beyond a reasonable doubt, are:

1. A communication with trial jurors (or) an attempt to intervene or communicate with trial jurors;
2. With the intent, and for the purpose of influencing their decision in his favor;
3. In a corrupt or wrongful manner.

Hence, applying the foregoing to the case before us, if you conclude, after considering all of the evidence, that the State has proved beyond a reasonable doubt that the defendant, between the dates of_____and_____, attempted to intervene or communicate with trial jurors,_____ _____Name(s)_____(or either of them/or all of them) (through_____(Agents)_____) for the purpose of influencing the decision of said trial jurors in his favor, corruptly, it is your duty to return a verdict of guilty as charged.

On the other hand, if after considering all of the evidence, or if by reason of a lack of evidence you conclude that the State has not proven beyond a reasonable doubt that between the dates mentioned in the indictment that the defendant attempted to intervene or communicate with said trial jurors (through _____(Agents)_____) for the purpose of influencing

the decision of the said trial jurors in his favor, corruptly, it is your duty to return a verdict of not guilty.

FOOTNOTES:

1. 1 Schlosser, Criminal Laws of New Jersey § 25:26 (3d ed. 1970).

2. 1 Schlosser, Criminal Laws of New Jersey § 25:27 (3d ed. 1970).

3. 26 Am. Jur.2d Embracery § 1 (1966).

4. Osborn v. United States, 385 U.S. 323 (1966). (This is a bribery case with principles applicable to the charge).

5. State v. Lavine, 96 N.J.L. 356 (Sup. Ct. 1921); aff'd. 97 N.J.L. 583 (E & A 1922).

6. Cf. State v. Begyn, 34 N.J. 35, 48 (1961). (This is a case involving misconduct in office which treats principles applicable to this charge).

Approved: 9/1/76

2.145 ESCAPE FROM COUNTY WORK RELEASE OR VOCATIONAL TRAINING RELEASE PROGRAM (N.J.S.A. 30:8-53)

Escape in its ordinary dictionary sense means to break loose from or get free of physical confinement or the custody of a police official. Inasmuch as the defendant here is charged with escape from a county work release program (escape from a vocational training release program) additional elements or facts must be proven beyond a reasonable doubt by the Prosecutor.

N.J.S.A. 30:8-53 provides simply:

> "Any person admitted to outside labor or a vocational training program under this act who shall escape or attempt to escape while in such status outside the county institution shall be deemed to have escaped and treated in accordance with the law."

Accordingly, what are the elements or facts which the State must prove beyond a reasonable doubt?

1) That initially the defendant was imprisoned in a county institution.

2) That he was serving a sentence.

3) That pursuant to the order of a judge the defendant was placed at outside labor (was permitted to attend a vocational training course).

4) That the defendant intentionally failed to remain within the extended limits of his work area or failed to go to or return from the work area within the time prescribed or deviated materially from the routes assigned to him for getting

to and from his work area (or attempted* one of these acts).

[If necessary charge INTENT]

5) That the defendant had been made aware of the assigned routes to and from his work area, the limits of the work area itself, and the time schedule he was to follow. The escape must be intentional. You would not have escape, of course, if the act was done through mistake, accident or ignorance. On the other hand, it is no defense that the defendant did not get very far from his work area, did not deviate greatly from his prescribed route or was free of his restraint only for a short time.

*The standard charge as to Attempt will, of course, be given if that situation is being presented.

FOOTNOTES:

1. "Force or fraud" is not a necessary element under either this statute-N.J.S.A. 30:8-53, or under the general escape statute, N.J.S.A. 2A:104-6. State v. Walker, 131 N. J. Super. 547 (App. Div. 1974).

2. A sentence for escape, after punishment by prison authorities for escape, does not constitute double jeopardy. State v. Hatterer, 75 N. J. Super. 400 (App. Div. 1962).

3. It is not a valid defense to the crime of escape for the defendant to contend that the terms of his confinement were improper, i.e., that the food was bad, the cell unsanitary, or his jailors were visiting improper punishment upon him. State v. Hayes, 52 N. J. Super. 178 (App. Div. 1958).

4. There can be no escape if the defendant is being held illegally, that is, if there was no valid sentence imposed upon him. State v. Williams, 10 N.J.L.J. 293 (1887).

5. The escape must be intentional. There is no escape if the act was done through mistake or ignorance. Meehan v. State, 46 N.J.L. 355 (1884).

6. Notice the difference between this statute governing county institutions and the statute governing state work release programs and other authorized extensions of confinement, N.J.S.A. 30:4-91.5. The latter statute provides:

> "The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the commissioner, shall be deemed an escape from confinement and shall be punishable as provided in section 2A:104-6 of the New Jersey Statutes."

As can be seen, this latter statute, rather than just referring to "escape", deals specifically with violations of extended area limits and time schedules. Further, this latter statute does not specifically provide for an attempted escape.

7. Please note that violations of other regulations governing the defendant's imprisonment do not constitute an escape from the program. For example, if the defendant was made aware of other prohibitions (against drinking while on the job, against being visited by friends or relatives, against the use of narcotics, against gambling), his violation might well constitute such a breach of the program that he would be removed from it but such would not constitute an escape. In other words, you are concerned here only with violations or limitations placed upon him which have to do with his routes to and from work, the limits of his work area, and his time schedule.

2.146 Entry With Intent To (Steal etc.[1]) - N.J.S.A. 2A:94-1

The indictment charges that the defendant(s) willfully or maliciously entered the _____ of _____ with intent to ("steal" or other crime charged in the indictment in violation of N.J.S.A. 2A:94-1.

The statute referred to in the indictment, 2A:94-1, states in pertinent part that:

> "Any person who willfully or maliciously... enters...any building...with intent to ("steal" or other crime charged) is guilty of a (crime)."

Accordingly you are to determine whether the State has proven beyond a reasonable doubt each of the following elements of the criminal offense charged:

1. That there was an entry by the defendant(s).
2. That the entering was willful or malicious.
3. That at the time of entering the defendant(s) intended[2] to ("steal" or other crime charged).

I will now define some of the terms which have been used.

An entry is required, and this element of the criminal offense is self explanatory. The State must prove beyond a reasonable doubt that the defendant(s) entered the building.[3] (At this point in the instruction the court should

consider commenting on the proofs concerning entry in the particular case.)

With respect to the second element of the crime, that is, whether the entry was willful or malicious, insofar as this case is concerned the words willful and malicious are synonomous. In considering this element of the criminal offense you will ask yourself whether the State has proven beyond a reasonable doubt that the defendant(s) acted voluntarily to accomplish a wrongful purpose.

With respect to the third element of the crime, you must ask yourself whether the State has proven beyond a reasonable doubt that the defendant(s) at the time he/they entered intended to ("steal" or other crime charged; at this point the particular crime involved should be defined for the jury). The provisions of our law make it mandatory that the intent to ("steal" or other crime charged) coexist with the entering.[4]

Intent is a condition of the mind and obviously cannot be seen but can only be determined by inferences from conduct, words or acts. Logically then it is not necessary for the State to prove that the defendant(s) said he/they had a certain intent at the time and place involved. The intent to ("steal" or other crime charged) may be gathered by you from the acts and conduct of the defendant(s) and from all that was said and done at the particular time and place

and from all the surrounding circumstances. The intent to ("steal" or other crime charged) may be inferred from what transpired after the unlawful entry occurred.[5]

NOTES:

1. The statute, N.J.S.A. 2A:94-1, refers to entry with intent to commit particular crimes, i.e. "entry with intent to kill, kidnap, rob, steal, commit rape, mayhem or battery." The above model charge is based on an indictment for "entry of a building with intent to steal" and must be adapted for use in connection with the other crimes covered by N.J.S.A. 2A:94-1.

2. N.J.S.A. 2A:94-1 requires a "specific intent to steal." State v. Del Vecchio, 142 N.J. Super. 359, 361 (App.Div. 1976)

3. With regard to "entry" see State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954) where the Court stated at page 416:

   "An entry is accomplished by the intrusion into the building of any part of the body, an arm, a hand, a finger or a foot, or, in some instances, of an instrument, providing the instrument is inserted and utilized as a means of effectuating or attempting to effectuate the theft and not solely as a means of accomplishing the breaking into the building."

4. State v. Martinez, 112 N.J. Super. 552, 555 (App. Div. 1970).

5. State v. Martinez, 112 N.J. Super. 552, 556 (App. Div. 1970).

Approved: 9/1/76

2.150 FALSE SWEARING

(Read the Indictment)

N.J.S.A. 2A:131-4 the statute referred to in the Indictment, reads in pertinent part as follows:

> "Any person who willfully swears falsely in any judicial proceeding or before any person authorized by any law of this state to administer an oath and acting within his authority, is guilty of false swearing ***."

The term "willful" is defined in a later section of the statute (N.J.S.A. 2A:131-7) as follows:

> "'Willful' shall, for the purposes of this article, be understood to mean intentional and knowing the same to be false."

As a result, these statutes make it a crime for a person to willfully and intentionally make a statement of belief or opinion (in any judicial proceeding while under oath or affirmation,) (before any person authorized by any law of this State to administer an oath who is acting within his authority,) which is known by the declarant to be false.

(ONLY CHARGE THE APPROPRIATE LANGUAGE AND RELATE IT TO THE FACTS IN YOUR CASE. SEE N.J.S.A. 41:2-1 et seq. AS TO PERSONS AUTHORIZED BY LAW TO ADMINISTER AN OATH, i.e.,

(Name) was a Notary Public who is a person authorized by law to administer an oath).

A "judicial proceeding" is a proceeding which takes place in or under the authority of a court of justice, or which relates in some way to the administration of justice. It is any proceeding at which legal rights and liabilities are determined. (ONLY CHARGE IF APPROPRIATE AND RELATE TO THE FACTS IN YOUR CASE, I.E. A TRIAL IS A JUDICIAL PROCEEDING).

The word "swears" means to assert or make a promise or statement while under oath.

An "oath" is an outward pledge given by a person that his attestation or promise is the whole truth.

The first element that the State must prove is that the defendant knowingly made a "false" statement. The word "statement" includes promises. For a statement to be "false" it must be proven to be untrue, a statement which is inconsistent with the truth. The word "false" carries an implication of a purpose to deceive. It implies a wrong, and signifies a knowing untruth. Falsity as used in this section means that the promise or statement must not only be false in fact, but that the defendant knew it was false.

The second element that the State must prove is that the false statement was made "willfully." This means that the State must prove that the defendant knew that he was making a false statement and that he made the statement intentionally. "Intent" and "knowledge", you must realize, are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. "Intent" means a purpose to

accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing. However, it is not necessary that the State produce witnesses to testify that the defendant said he had a certain intent and knowledge when he made the false statement. His intent and knowledge can be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all the surrounding circumstances.

The third element that the State must prove is that the defendant made the false statement, (during a "judicial proceeding" while he was under "oath or affirmation" as I have already defined those terms to you) (before any person who is authorized by any law of this State to adminster an oath and who was acting within his authority).

(ONLY CHARGE THE APPROPRIATE LANGUAGE AND RELATE IT TO THE FACTS IN YOUR CASE).

To repeat, the elements that the State must prove, beyond a reasonable doubt, are:

(1) That defendant knowingly made a false statement;

(2) That such false statement was made willfully and intentionally;

(3) That such false statement was made (during a judicial proceeding while he was under oath) (before any person who is authorized by any law of this State to administer an oath and who was

acting within his authority).

(ONLY CHARGE THE APPROPRIATE LANGUAGE AND RELATE IT TO THE FACTS IN YOUR CASE).

Note: State v. Parmigiani, 65 N.J. 154 (1974) held the false swearing statute was drawn broadly to enable false swearing prosecutions without satisfying all the technical requirements of perjury and would be applicable to those who may testify in lieu of oath under R.1:4-4(b), certification, and also to those who testify without oath but with "affirmation or declaration to tell the truth under the penalty provided by the law".

Cases Cited

1. State v. Browne, 43 N.J. 321 (1964).
2. State v. Doto, 16 N.J. 397 (1954), cert. denied, 349 U.S. 912 (1955).
3. State v. Engels, 32 N.J. Super. 1 (App. Div. 1954).
4. State v. Eisenstein, 16 N.J. Super. 8 (App. Div. 1951), affirmed, 9 N.J. 347 (1952).
5. State v. Fuchs, 60 N.J. 564 (1972).
6. State v. Williams, 59 N.J. 493 (1971).
7. State v. Siegler, 12 N.J. 520 (1953).

Approved: 9/1/76

2.151 FORGERY

The indictment reads in pertinent part as follows:

(READ INDICTMENT)

The pertinent part of the statute on which this indictment is based reads as follows:

N.J.S.A. 2A:109-1

> Any person who, with intent to prejudice, injure, damage or defraud any other person:
>
> a. Falsely makes, alters, forges or counterfeits any record or other authentic matter of a public nature or character, or any printed or written instrument or indorsement, acceptance, transfer or assignment thereof;
>
> * * *
>
> is guilty of a ... [crime].

Forgery is the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal significance, or the basis of a legal obligation. Forgery may be committed by executing a written instrument in a fictitious or assumed name with intent to defraud.

The essential elements of the offense of forgery, each of which the State must prove beyond a reasonable doubt, are:

(1) That the writing in question was falsely made or altered by the defendant; and

(2) That the defendant so acted with specific intent to defraud; and

(3) That the falsely made or altered writing was apparently capable of effecting a fraud; and

(4) That the writing, if genuine, would operate as the basis of another's liability (or the evidence of his right).

To establish the first essential element of the offense, it is not necessary that the whole instrument has been falsified or altered, but only that it have contained some material misrepresentation of fact.

[Thus, even though the signature on the instrument be the genuine signature of the complainant, if you find that the name of the payee or the amount were not written by the complainant or were not filled in by someone at the direction of the complainant or with his consent, then you may find that the instrument (check) was falsely made or altered.]

(USE BRACKETED LANGUAGE IF APPROPRIATE)

To establish the second essential element, it is not necessary that anyone have actually been defrauded, or that the defendant have had the intent to defraud any particular person, individual or a bank. It is necessary that the defendant have had the intent to defraud someone.

[DEFINE INTENT WHERE NECESSARY]

To establish the third essential element, it is necessary that the falsely made or altered writing have been reasonably adapted to deceive another person into relying on the writing

as true and genuine. It is not necessary that the false writing have been accurate enough to deceive a bank or the payor of the writing, but if the false writing was such that no person of ordinary intelligence could reasonably have been deceived by it, this element of the offense is lacking.

To establish the fourth essential element, it is necessary that the State prove that the check (instrument or document) would operate as the basis of another's liability (or would operate as evidence of another's right or title).

It is not necessary that anyone have actually suffered loss.

State v. Berko, 75 N.J. Super. 283 (App. Div. 1962)

State v. Ruggiero, 43 N.J. Super. 156 (App. Div. 1956), aff'd, 25 N.J. 292 (1957)

State v. Longo, 132 N.J.L. 515 (Sup. Ct. 1945)

Rohr v. State, 60 N.J.L. 576 (E.&A. 1897)

State v. Redstrake, 39 N.J.L. 365 (Sup. Ct. 1877)

NOTE:

1. See Model Jury Charge 2.300, Uttering of a Check. This charge covers subsection b. of N.J.S.A. 2A:109-1.
2. Forging state lottery tickets, N.J.S.A. 5:9-14.1.
3. Forgery of driver's license and auto registration are exclusively under N.J.S.A. 39:3-38.1. Conviction of uttering forged driver's license under N.J.S.A. 2A:109-1 could not stand. State v. Johnson, 115 N.J. Super. 6 (App. Div. 1971).

4. Forged credit cards, N.J.S.A. 2A:111-43 et seq. One who illegally uses a forged credit card can be prosecuted under N.J.S.A. 2A:111-43 et seq. governing credit card thefts and misuse or under N.J.S.A. 2A:109-1. State v. Gledhill, 67 N.J. 565 (1975).

Approved: 9/1/76

2.180 INCEST - N.J.S.A. 2A:114-1 (PROHIBITED MARRIAGE)

The indictment charges the defendant with a violation of N.J.S.A. 2A:114-1. That statute in its pertinent parts may be paraphrased as follows:

> Persons who intermarry within the degrees prohibited by law, or who, being related within such degrees, together commit fornication or adultery are guilty of incest . ...

A reading of the indictment together with the statute will indicate the essential elements of the crime.

1. The parties must be related by blood within the prohibited degree (HERE SPECIFY THAT THE RELATIONSHIP OF _____ _____ and _____ FALLS WITHIN THE DEGREE PROHIBITED BY LAW).

2. That _____ had sexual intercourse with _____.

3. An intent on the part of the defendant to have sexual intercourse with _____.

(IF APPLICABLE CHARGE STANDARD INTENT CHARGE)

Sexual intercourse requires the penetration of the female sexual organ by the sexual organ of the male. Sexual intercourse between persons related within the degree wherein marriage is prohibited by law is the crime. That act is criminal even though voluntarily consented to by both parties.

NOTE:

1. Carnal knowledge is an essential element - State v. Masnik, 123 N.J.L. 335 (Sup. Ct. 1939), aff'd, 125 N.J.L. 34 (E.&A. 1940); State v. Columbus, 9 N.J. Misc. 512 (Sup. Ct. 1931), reargument denied, 9 N.J. Misc. 568 (Sup. Ct. 1931).

2. Conviction may be had under this section even if there was consent and no force was used. State v. Columbus, supra; State v. Hughes, 108 N.J.L. 64 (Sup. Ct. 1931), rev'd on other grounds, 109 N.J.L. 189 (E.&A. 1932).

3. Incest falls within purview of the sex offenders act, N.J.S.A. 2A:164-3.

4. Even though legal elsewhere cohabitation in New Jersey within prohibited degree constitutes incest. Bucca v. State, 43 N.J. Super. 315 (Ch. Div. 1957).

5. N.J.S.A. 37:1-1, requires the relationship to be of the half or whole blood; and sets forth prohibited degrees of relationship.

Approved: 9/1/76

2.181 INCEST - N.J.S.A. 2A:114-2

The indictment charges the defendant with a violation of N.J.S.A. 2A:114-2. The statute reads as follows:

> A parent who commits incest, fornication, adultery or lewdness with, or an act of indecency towards, or tending to debauch the morals and manners of a child of such parent, or who makes any infamous proposal to a child of his own flesh and blood, with intent to commit adultery or fornication with the child, is guilty of a ... [crime] ... .

A reading of the indictment together with the statute will indicate the essential elements of the crime. The State must prove beyond a reasonable doubt:

1. That defendant is the natural parent of _____.
   Name of child

2. That defendant (CHARGE AS FACTS INDICATE)

   a. Had sexual intercourse with his/her child, and/or

   b. Committed act(s) of indecency towards, or tending to debauch the morals and manners of his/her child, and/or

   c. Made infamous proposal(s) with the intent to commit sexual intercourse with his/her child.

3. An intent on the part of defendant to (refer to offense charged in #2 in the present tense).

The State has offered the following proof of paternity:

(GO INTO FACTS: IF PATERNITY NOT IN ISSUE OMIT)

WHERE CHARGED WITH OFFENSE AS OUTLINED IN:

I) 2(a) Charge as follows:

Sexual intercourse means a penetration by the sexual organ of the male into the sexual organ of the female. The act of sexual intercourse between a natural parent and child is the criminal act forbidden. Even a voluntary act of intercourse, submitted to by the child willingly, with consent, and without force, is the act prohibited.

II) 2(b) Charge as follows:

The acts prohibited by the statute are those motivated solely by lust that force or induce the child to do or submit to an act that corrupts the sexual moral principles of the child.

III) 2(c) Charge as follows:

The making of infamous proposal(s) is/are the act(s) by the defendant, with the intent to have sexual intercourse with the child is/are the act(s) prohibited. Actual sexual intercourse is not required.

[IF APPLICABLE, CHARGE STANDARD INTENT CHARGE, INCORPORATING ALLEGED OFFENSE - ALSO CONSIDER CHARGE ON FRESH COMPLAINT WHERE APPROPRIATE]

The laws of our State do not require the testimony of the complaining witness be corroborated. The defendant may be convicted on the uncorroborated testimony of his/her child provided you find such testimony to be credible, trustworthy and believable.

NOTES:

1. Carnal knowledge is an essential element - State v. Masnik 123 N.J.L. 335 (Sup. Ct. 1930), aff'd, 125 N.J.L. 34 (E.&A. 1940); State v. Columbus 9 N.J. Misc. 512 (Sup. Ct. 1931), reargument denied, 9 N.J. Misc. 568 (Sup. Ct. 1931). (Only applies to 2(a) on page 1)

2. Conviction may be had under this section even if there was consent and no force was used. State v. Columbus, supra; State v. Hughes, 108 N.J.L. 64 (Sup. Ct. 1931), rev'd on other grounds, 109 N.J.L. 189 (E.&A. 1931).

3. Incest - falls within purview of the sex offenders act. N.J.S.A. 2A:164-3.

4. Even though legal elsewhere, cohabitation in New Jersey within prohibited degree constitutes incest. Bucca v. State, 43 N.J. Super. 315 (Ch. Div. 1957).

5. N.J.S.A. 37:1-1, requires the relationship to be of the half or whole blood; and sets forth prohibited degrees of relationship.

6. State v. Garcia, 83 N.J. Super. 345 (App. Div. 1964), corroboration not necessary.

7. Reported acts prohibited under this section:

a. Sexual intercourse, Masnik, supra.

b. Fellatio, State v. Arnwine, 67 N.J. Super. 483 (App. Div. 1961).

c. Infamous proposals (separate from act of sexual intercourse) Hughes, supra.

Approved: 9/1/76

2.200 KIDNAPPING (WHILE ARMED)

The indictment which I've read to you charges the defendant with the crime of kidnapping (while armed) and is in two counts. The first count is based upon N.J.S.A. 2A:118-1, which provides in pertinent part as follows:

> Any person who kidnaps or steals or forcibly takes away a man, woman or child, and sends or carries, or with intent to send or carry, such man, woman or child to any other point within this state, or into another state, territory or country ... is guilty of a [crime] ... .

In order to establish the guilt of the accused, _____, under this indictment, it is necessary that the State prove beyond a reasonable doubt each of the following elements of the offense:

1. That the accused, _____, did kidnap, or steal or forcibly take away the alleged victim, _____, from one point within this State to another point within this State [or into another state, territory or country.]
2. That such action was done by the defendant without lawful authority, and
3. That such action was done by the defendant willfully or maliciously.

The terms "kidnap or steal or forcibly take away" all convey a similar meaning. The action condemned by the statute is kidnapping which may be defined as the taking away of a person forcibly from one point to another point without lawful authority. It is the

fact of, or the existence of a forcible removal which constitutes kidnapping, and the crime's occurrence does not depend on the distance that the victim is taken. In other words, the sending, carrying or transporting of the victim to a specific destination is not essential to the offense, as long as the taking of the victim was "forcible". When we speak of forcible, we mean against one's will, so that if a person is taken anywhere against his/her will, the taking away may be said to be forcible.

In this case, there is no contention, nor any evidence, to support a contention that the claimed kidnapping or stealing or forcible taking away of the victim was under lawful authority so that you need not concern yourselves with that element [where evidence would support a contention of taking under lawful authority, the applicable law should be inserted].

As to the terms willful and malicious:

Willfully - the word "willfully" when applied to the intent with which an act is done implies a purpose or willingless to commit the act in question. The word "willful" does not require, in its meaning, any intent to violate a specific law, it refers rather to an intent to commit the act alleged, namely the alleged forcible taking away of the victim from one point to another.

Maliciously - the word "maliciously", when applied to the intent with which an act is done imports an intent to do a wrongful act.

The second count of the indictment charges that the crime of kidnapping was committed by the defendant while armed with a

_____. This count is based upon N.J.S.A. 2A:151-5 which in pertinent part provides in effect as follows:

> Any person who commits a kidnapping when armed with or having in his possession any _____, shall, in addition to the punishment provided for the crime of kidnapping be punished additionally by the Court upon conviction. (Where a crime is perpetrated by more than one person, the weapon possessed by one is, within the statute, deemed to be possessed by all who participate in the crime.)

Consequently, when reaching your verdict as to the defendant's guilt or innocence, you must first decide whether the kidnapping was committed by the defendant, and if you find the kidnapping was committed by him, you must further decide whether the State has proved beyond a reasonable doubt he was armed at that time with a _____ (within the meaning of the statute) as alleged in this count of the indictment. If you determine in your deliberations that the State has not proven the defendant guilty of kidnapping beyond a reasonable doubt, then your verdict is to be one of not guilty of the kidnapping alleged. Then it naturally follows that such verdict of not guilty applies to the charge of being armed. For, if the defendant is not guilty of kidnapping it follows he cannot be guilty of kidnapping while armed.

There are two counts to (charges made in) this indictment, each of which counts (charges) requires a verdict of guilty or not guilty - hence two verdicts are required.

As to the first count (charge) of the indictment charging kidnapping, your verdict shall be either guilty or not guilty.

As to the second count (charge) of the indictment charging kidnapping while armed with a _____ _, your verdict shall be either guilty or not guilty.

Bear in mind my earlier instruction - if you find the defendant not guilty of kidnapping then you will find him likewise not guilty of kidnapping while armed with a _____.

Approved: 9/1/76

2.210 LARCENY

N.J.S.A. 2A:119-2, which is a law of the State of New Jersey, provides in its pertinent part that any person who steals any money, goods, chattel or other personal property of another is guilty of a crime.

You cannot find the defendant guilty unless you determine that the State has proved the following three elements beyond a reasonable doubt:

1. That the defendant had an intent to take the property of another.
2. That the defendant had an intent to convert the property of another.
3. That there was an unlawful taking by the defendant of the property of another.

With regard to the element of intent ... (Here insert model charge on intent).

With regard to the requirement of proof of an intent to convert, you are instructed that the word "convert" as used here means the unauthorized assumption and exercise of the right of ownership over goods or property of another. In other words, an intention to convert means an intention to deprive another permanently of his property.

Concerning the requirement of the State to prove an unlawful taking, an unlawful taking

means complete and independent possession and control of property adverse to the rights of the owner. If such possession is determined by you to have occurred, the length of time of such possession is immaterial. In order to prove an unlawful taking, the State need not prove that the property was carried out of the place in which it was kept, but only that it was moved or taken from its original location.

NOTE: N.J.S.A. 2A:119-2 provides that the offense is a misdemeanor if the price or value of the property is in excess of $200 and under $500, and a high misdemeanor if $500 or over. N.J.S.A. 2A:170-30.1 provides that if the price or value of any such property is $200 or less then it is a disorderly persons offense. Therefore, if the price or value of the property is in dispute, the jury should be instructed as follows:

> Since the price or value of the property involved determines the severity of the offense, the State must also prove its value beyond a reasonable doubt. If you find the defendant guilty, you should then indicate whether you find the price or value of the property involved to be (1) $500 or over, (2) in excess of $200 but under $500, or (3) $200 or less."

State v. South, 28 N.J.L. 28 (Sup. Ct. 1859)

State v. Saulnier, 63 N.J. 199 (1973)

Approved: 6/24/75

2.211 PUBLIC LEWDNESS

The indictment before us charges the defendant with the crime of public lewdness. The statute upon which the indictment is based reads in pertinent part as follows:

> "Any person who commits open lewdness or a notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners of the people * * * is guilty of a violation of ... [the law]."[1]

In order to establish the guilt of the defendant, the burden is upon the State to prove beyond a reasonable doubt, each of the following elements of the offense charged in the indictment. They are that on _____(Date)_____ in the _____(Place)_____ the defendant committed an act:

1. which is indecent
2. was open and notorious
3. tends to debauch the morals and manners of the people, and
4. that such act was done with the intent to debauch the morals and manners of the people, i.e., the defendant intended his act to be seen.[2]

Lewdness within the concept of the statute imports some degree of sexual aberration or impurity.[3]

It signifies open and public indecency.[4] An act that is indecent is an act that is offensive to common propriety or offending against modesty and delicacy; an act that is grossly vulgar.[5]

For an act to amount to open lewdness or to a notorious act of public indecency it must be done in a public place. However, the place is a public one if the act is such as to be seen by another and likely to be seen by a number of casual observers if they had looked. Within the meaning of the statute the act is done openly or publicly when committed in a private yard and visible from the windows of inhabited dwellings, or when committed in a store and visible from the street; or when done in a theatre; or in an automobile standing on a public street;[6] or parking area.[7]

The word debauch means to corrupt or mar or spoil,[8] hence an act which tends to debauch the morals and manners of the people is one which tends to corrupt, mar or spoil the morals and manners of the people.

To be criminal, the act must be done intentionally and not accidentally,[9] and with the intent that the act be seen by another or others.[10]

(HERE CHARGE INTENT -
Model Charges 4.181)

1. N.J.S.A. 2A:115-1.

2. State v. Beckett, 56 N.J. 267, 269 (1970); State v. Way, 131 N.J. Super. 422 (App. Div. 1974).

3. State v. Brenner, 132 N.J.L. 607, 610 (E & A 1945).

4. 2 Schlosser, Criminal Laws of N.J. § 61:1.

5. Black's Law Dictionary. 909 (4th ed. 1968).

6. 2 Schlosser, Criminal Laws of N.J. § 61:6.

7. State v. Beckett, supra, at 268.

8. Black's Law Dicitionary. 489 (4th ed. 1968).

9. Van Houten v. State, 46 N.J.L. 16, 18 (Sup. Ct. 1884).

10. State v. Beckett, supra, at 270.

See also: State v. Dorsey, 64 N.J. 428 (1974).

Approved: 9/1/76

2.212 LARCENY FROM THE PERSON

N.J.S.A. 2A:119-1

The pertinent language of the statute with which this defendant is charged with having violated reads as follows:

> "Any person who willfully or maliciously takes or steals, or attempts to take or steal any money, goods or chattels from the person of another, whether with or without his knowledge, but without such force or putting in fear as is sufficient to constitute robbery, or who is present aiding or abetting therein, is guilty of a ... [crime].

This crime is commonly called larceny from the person which has been defined in the law to be the unlawful taking by one person from the person or custody of another personal property, with the felonious intent wrongfully to convert such property to his own use without the consent of the owner (or other person).

To justify a conviction of the crime of larceny from the person, the essential elements to be proved beyond a reasonable doubt are:

1. The wrongful taking and carrying away of the personal property by the accused from the person of another or from his immediate custody and control.*

"Willful" means knowingly or voluntarily.

"Malice" is the intentional doing of a wrongful act. "Malice" implies bad intent or an evil mind.

2. An intent to wholly deprive the person of the personal property;

3. The taking must be without any claim or pretense of right; and

4. An intent to commit the offense.

INTENT: Model Charge 4.181

In determining whether these essential elements have been proven, you may consider the overt acts of the defendant, the attending circumstances and the logical inferences which may be drawn therefrom.

*See State v. Raymond Blow, 132 N.J. Super. 487 (App. Div. 1975)

NOTE: To distinguish this offense from the greater offense of robbery you might consider the following example: - Any sort of secret or sudden taking of property from a person without putting him in fear and without terror or open violence, e.g., by snatching a thing, is deemed not to amount to robbery but to larceny from the person. But if there be a struggle to keep it, or any violence, or disruption, the taking is robbery; the reason for the distinction being that in the former case there can be inferred neither fear nor the intention violently to take in the face of resisting force. If putting in fear be established the offense is robbery. Moreover, when there is injury to the body, as when the thing is torn from the person, as an earring from an ear, the offense constitutes robbery. Schlosser, 2 Crim. Laws of New Jersey 3d § 92:8.

The unexplained and exclusive possession of stolen property shortly after the theft justifies a permissible inference that the possessor

is the thief. State v. Dancyger, 29 N.J. 76, 85, 86, 89. (1959) That this inference may be made does not shift the burden which the State bears to prove beyond a reasonable doubt that the possessor is the thief.

Approved: 3/7/77

2.213-A PRIVATE LEWDNESS

(N.J.S.A. 2A:115-1)

(To be used where Indictment charges acts of indecent exposure)

(Name), the defendant in this case, stands trial before this Court and Jury on an Indictment returned by the Grand Jury of this county charging that defendant committed an act or acts of private lewdness in that on (Date) at (Place) within the jurisdiction of this Court, he (or she) did (Acts complained of) with or in the presence of (Name of alleged victim) in violation of our criminal law.

The pertinent part of the statute under which the Indictment was presented reads as follows:

> "Any person who...in private commits an act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a "...crime. (N.J.S.A.2A:115-1)

Private Lewdness is confined to two kinds of offensive conduct, and is defined as and limited to acts of indecent exposure and to acts tending to subvert the morals of minors. We deal here with alleged acts of indecent exposure.

The proper standard for ascertaining whether a privately committed act is one of indecent exposure within the meaning of the criminal statute is whether under the circumstances the conduct is offensive.

Indecent exposure by definition is exposure to sight of the private parts of the body in a lewd or indecent manner. An act that is offensive to common propriety or offending against modesty and delicacy; an act that is grossly vulgar.

Debauch means to corrupt or mar or spoil.

The gravamen, i.e. the gist of the offense of indecent exposure as constituting an act of private lewdness centers not upon the prevalent public view as to the offensiveness of the conduct because a private act of exposure between consenting adults, not offensive to the participants, nor occuring under circumstances in which the defendant could reasonably be deemed to have intended, or known that the conduct was likely to be seen by the public, does not constitute indecent exposure within the ambit of the statutory offense of private lewdness.

In order to convict the defendant of indecent exposure within the meaning of the statutory crime of Private Lewdness, the State must prove beyond a reasonable doubt that:

1) The defendant exposed to sight his (or her) private parts in a lewd, vulgar or indecent manner;
2) The defendant's act of exposure was done intentionally and not accidentally, and with intent that his (or her) exposure be seen by the persons present;
3) The defendant's conduct was offensive to and without the consent of the person or persons present.

If you find that the State has proven beyond a reasonable doubt each and every element, then you must find the defendant guilty. If you find, however, that the State has failed to so prove, then you must find the defendant not guilty.

(Here charge Intent - Model Charge 4.181)

(If Appropriate, Charge Following Paragraph)

If the act is unintentional or accidental it is not a criminal offense. An accident is something which happens unexpectedly wholly without design, and completely by chance. It is an unforeseen event, misfortune, act or omission which is not the result of misconduct. Where a person commits an act or makes an omission through misfortune or by accident under circumstances that show the act was not intentionally or purposely committed, he does not thereby commit a crime.

* *

CITATIONS

See citations to Model Charge 2.213-B.

Approved: 3/7/77

2.213-B PRIVATE LEWDNESS

(N.J.S.A. 2A:115-1)

(To be used where Indictment charges acts tending to subvert morals of minor

(Name), the defendant in this case, stands trial before this Court and Jury on an Indictment returned by the Grand Jury of this County charging that defendant committed an act or acts of private lewdness in that on (Date) at (Place) within the jurisdiction of this Court, he (or she) did (acts complained of) with or in the presence of (Name of alleged victim) in violation of our criminal law.

The pertinent part of the statute under which the Indictment was presented reads as follows:

> "Any person who...in private commits an act of lewdness or carnel indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a" ...crime. (N.J.S.A. 2A:115-1)

Private Lewdness is confined to two kinds of offensive conduct, and is defined as and limited to acts of indecent exposure and to acts tending to subvert the morals of minors.

We deal here with alleged acts tending to subvert the morals of minors.

In order to convict the defendant for a privately committed act as one tending to subvert the morals of a minor within the meaning of the criminal statute prohibiting private lewdness, the burden is upon the State to prove beyond a reasonable doubt:

1) That the defendant committed an act of lewdness.
2) That defendant's conduct tends to debauch the morals and manners of a minor.

3) That the person present witnessing the defendant's offensive conduct or involved in the questionable conduct was under the age of 18 years.

4) That defendant's conduct occurred with intent that the act be seen by the minor.

(Here charge Intent - Model Charge 4.181)

Lewdness within the concept of the statute imports some degree of sexual aberration or impurity. It signifies gross and wanton indecency. An act that is indecent is an act that is offensive to common propriety or offending against modesty and delicacy; an act that is grossly vulgar.

Debauch means to corrupt or mar or spoil, hence an act which tends to debauch the morals and manners of a minor is one which tends to corrupt, mar or spoil the morals and manners of people under the age of 18 years. It is immaterial whether the act or conduct of the defendant was with or without the consent of the minor present. The law protects the person who is under the statutory age by providing that the child cannot, in law, consent, i.e. the minor by his or her consent cannot relieve a defendant taking advantage of his or her immaturity of the responsibility for his or her acts of conduct.

* *

NOTE:

The foregoing charges relate to acts of Private Lewdness as distinguished from acts of Public Lewdness. For Charge on Public Lewdness, see Model Jury Charge 2.211.

Indictments for private lewdness as well as public lewdness, however, are laid under the same statute, i.e. N.J.S.A. 2A:115-1.

While public lewdness was punishable as a common law offense as a nuisance, injurious to public morals, private lewdness was not criminal at common law since there was no offense to the public morals.

Our Crimes Act, was amended in 1906 to condemn private lewdness; this portion of the statute, therefore, is a penal statute in derogation of common law.

Private Lewdness, by case law (State v. Dorsey and State v. J.O. and F.C., infra), is now defined as and limited to two kinds of offensive conduct, namely acts of indecent exposure or acts tending to subvert the morals of minors. Thus, if the Indictment charges but one of the two kinds of offensive conduct, use only the appropriate charge.

Acts of sexual misconduct already made crimes by separate enactments are excluded from the reach of this statute condemning private lewdness.

C I T A T I O N S

1. N.J.S.A. 2A:115-1.

2. Van Houten v. State, 46 N.J.L. 16 (Sup. Ct. 1884).

3. State v. Brenner, 132 N.J.L. 607 (E. and A. 1945).

4. State v. Beckett, 56 N.J. 267 (1970).

5. State v. Dorsey, 64 N.J. 428 (1974).

6. State v. Way, 131 N.J. Super. 422 (App. Div. 1974).

7. State v. J.O. and F.C., 69 N.J. 574 (1976).

8. Schlosser Volume 2, Criminal Laws of N.J., pps. 61:1 et. seq.

9. Black's Law Dictionary, pps. 489 and 909, (4th ed. 1968)

2.219 MALICIOUS DESTRUCTION OF OR DAMAGE TO PROPERTY

The ____count of the indictment charges the defendant with the malicious destruction of or damage to the property of another. The statute upon which this indictment is based reads as follows:

> Any person who willfully or maliciously destroys, damages, injures or spoils, any real or personal property of another, either of a public or private nature is guilty of a violation of the law.

The statute read in conjuncture with this indictment discloses the elements which the state must prove beyond a reasonable doubt to establish the guilt of the defendant of said charge. Those elements are as follows:

1. The damage or destruction as the case may be, to the property of another, public or private.

2. That the damage or destruction was inflicted willfully or maliciously by the defendant.

3. (If the value of the property is in issue the question of value should be submitted to the jury in the following fashion:)

Since the value of the property determines the extent of the punishment which can be imposed by the court, it is necessary for you to determine whether the damage is over or under the sum of $200.00.[1]

In this case the state alleges that the defendant destroyed or damaged the property of (SPECIFY HERE THE FACTS ALLEGED BY THE STATE).

"Willful or Malicious" in the context of this particular offense means done with actual ill will. The acts complained of

must have been done out of a spirit of wantonness, with an evil intent and with no reasonable grounds for believing the act was lawful. The acts must be committed with a state of mind which shows no regard for social duty or in other words a wrongful act intentionally done without legal justification or excuse.

"Intent" means a purpose to accomplish something, a resolution, a resolve to do a particular act or accomplish a certain thing.

Intent is a condition of the mind which cannot be seen.

It is not necessary for the state to produce a witness or witnesses who can testify that the defendant stated, for example, that he had a certain intent at the time he committed the acts in qustion. It is within the power of the jury to find that proof of intent has been furnished beyond a reasonable doubt by inference which may arise from the nature of the acts and circumstances surrounding the event under investigation. Such things as the place where the act occurred, the instrument that was used to inflict the damage if any and all that was said or done by the defendant immediately preceding at the time of or immediately after the alleged act was accomplished.

NOTE: If the determination is under $200.00 then under State v. Saulinier, 63 N.J. 199, 306 Atl. 2d 67, 1973, the court molds the verdict accordingly.
State v. Thomas Tonnisen, 92 N.J. Super. 452, 224 Atl. 2d 21 1966.

State v. Shultz, 41 N.J.L.J. 176 1918.

1 The misdemeanor penalty prescribed by N.J.S. 2A:122-1 applies in cases where "no punishment is otherwise provided by statute." In cases where the injury to property results in a loss of less than $200, N.J.S. 2A:170-36 declares the action a disorderly persons and is deferred to by 2A:122-1.

Approved:

2.220 MAINTAINING A GAMBLING RESORT

The defendant has been indicted for violating the provisions of New Jersey State Statute 2A:112-3, the pertinent parts of which read as follows:

> "Any person who, habitually or otherwise....keeps a place to which persons may resort for engaging in....gambling in any form, is guilty of a ..." crime.

The plain meaning of the quoted language is that any person who purposefully or intentionally keeps a place where any of the prohibited forms of gambling may be pursued is guilty of a violation of this statute. In other words, the gist of this crime is the purposeful or intentional act of making available a place outfitted in some way to accomodate gamblers.

In line with this purpose, it must be noted that the State need not prove gambling activities actually were conducted, or that persons actually frequented the premises for the purpose of gambling, or even that the alleged operator of the gambling resort made any profit from his activities.[1] In short, this statute seeks not to punish

gambling or gamblers, but rather the person or persons who intentionally keep a place where such activities may go on.

Before the defendant can be convicted, however, you must find the State has sustained its burden of proving, beyond a reasonable doubt, each and every one of the following elements in this offense:

1. The defendant, on at least one occasion, had in his control, a premises where gambling may be pursued.[2]
2. The defendant knew the premises may be used for gambling. Knowledge means a conscious awareness as opposed to mere lack of care or regard. Knowledge is not required to be proven by direct evidence, but rather, knowledge may be inferred from the defendant's conduct, actions, and statements as well as the surrounding circumstances.

   The term "gambling" as used here is intended to be understood as signifying or relating to something more than a mere game of chance undertaken for one's mere amusement. That is, the "gaming" or "gambling" as used here

must embody the further elements of (a) chance, (b) price or cost, and (c) prize. A price must be paid and a prize won or lost based on a game of chance.[3]

3. The defendant intended that persons should resort to the premises for gambling purposes. Intent means a purpose; a resolve to do a certain thing or to accomplish a certain objective or end. It is a condition of the mind which cannot be seen and can only be determined as other mental states are determined by reference to conduct, words, or acts of the defendant in the existing circumstances.

Once again then, the essential elements are:

1. Control of the premises, which means the exercise of authority to manage or supervise or govern or oversee. (Note: If ownership is a proven fact, it may be considered as it relates to evidence of control. See supplemental charge re control, infra).
2. Knowledge which implies a conscious awareness rather than a mere lack of care or regard. But, mere knowledge is not sufficient; it must be coupled with intent, and

3. Intent which means a purpose, a resolve to facilitate or accomplish a certain objective or end.

With regard to wager and reward or a price paid and a prize won or lost based upon a game of chance, it is not necessary that the State prove money actually passed on the premises. It is sufficient if it be shown that there was an understanding that later payments of amounts won or lost would be made.[4]

It is further not necessary to prove that actual betting occur on the premises; it is sufficient if the premises is a "clearing house" where bets made elsewhere are collected and processed.[5]

With regard to the concept of resorting to a place for gambling purposes, it must be understood that resort does not necessarily mean personal attendance; this requirement in the statute is satisfied by any form of communication therewith, including the telephone.[6]

The essence of this crime is an intent that persons should resort to a premises for the purpose of gambling. Intent need not be proven by direct evidence, that is, by the production of witnesses who testify that defendant said he had a certain intent, but rather, circumstantial evidence is sufficient. In other words, you may infer the defendant's intent from all the surrounding circumstances and references to his conduct, words, or acts under those circumstances.

FOOTNOTES:

1. State v. Sachs, 69 N.J. Super. 566 (App. Div. 1961)
2. State v. Clark, 137 N.J.L. 614 (E. & A. 1948) and State v. Bogen, 13 N.J. 137 (1953) (define "habitually or otherwise").
3. O'Brien v. Scott, 20 N.J. Super. 132 (Ch. Div. 1952) and State v. Western Union Telegraph Co., 12 N.J. 468 (1953)
4. State v. Sachs, 69 N.J. Super. 566 (App. Div. 1961)
5. State v. Puryear, 52 N.J. 81 (1968), - (Note:

   It would appear, however, that if the State could prove neither actual gambling nor actual attendance, it would be necessary that it produce gambling paraphernalia found on the premises. Note also: Distinguish premises from mere warehousing of gambling paraphernalia.)
6. Ames v. Kirby, 71 N.J.L. 442 (Sup. Ct. 1904)

   Note: Supplemental charge re "Control" (to be used when control of premises is disputed. Insert the following for that which appears under #1 on Page 2 of charge).

   "1. Control of the premises which means the exercise of authority to manage or supervise or govern or oversee. What you are to be concerned with here is the actual control, management or supervision of the premises at the time of the alleged offense.

Naturally, legal ownership of the premises may be considered by you in your determination of whether or not the defendant was in control of the premises. However, legal ownership is not conclusive proof of control for the purposes of this statute. For example, one co-owner of property who knows nothing of illegal activities on the property being carried on by the other co-owner would not be "in control of the premises", for the purposes of this statute; nor would an unknowing hotel owner be responsible for the actions of his guest, or an unknowing landlord for the actions of his tenant, or an unknowing employer for the actions of his employee. (See generally 38 C.J.S. Gaming 99 and 15 A.L.R. 1204).

Approved: 9/1/76

2.220(a) PERMITTING LOTTERIES ON PREMISES

The defendant has been charged with a violation of a provision of our statutes pertaining to lotteries. That statute (N.J.S.A. 2A:121-3) provides in part: "Any person who:

(c) being the owner of a building or place where any business of lottery or lottery policy, so-called, is carried on knowingly, by himself or his agent, permits such premises to be so used is guilty of a [crime]."

In order for you to find the defendant guilty, you must be satisfied that the State has proven, beyond a reasonable doubt, each of the following essential elements of the offense charged:

(1) that the defendant is the owner of a building or place where a lottery or lottery policy business, so-called, is carried on. Owner means one who has title to the property (the building itself) or one who owns a proprietary interest in the property as a tenant by way of a leasehold; in other words, an owner of a place;

(2) that the defendant knows that the business being carried on at such premises by himself or his agent is in fact a lottery or lottery policy operation and knowingly permits such premises to be so used.

The term "lottery" means the distribution of prizes by chance in return for a consideration in the form of money or other valuable thing.

It is not necessary for the State, in order to sustain its burden, to prove the existence of an actual, particular lottery.

In order for the defendant to be convicted, you must be satisfied that the State has proven beyond a reasonable doubt that defendant is the owner of a building or place (as I just explained this to you) where a lottery or lottery policy business is carried on by himself or his agent and that defendant knew the nature of the business being carried on at his or her premises; namely, a lottery or lottery policy operation and knowingly permitted such premises to be so used.

Intent and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing.

Knowledge means a conscious awareness as opposed to mere lack of care or regard.

It is not necessary that the State produce witnesses to testify that defendant said he had a certain intent and knowledge when he engaged in a particular act. Intent and knowledge may be proven and inferred from circumstantial evidence, including the nature of any exhibit in evidence, and by reference to defendant's conduct, words or acts, and from all of the surrounding circumstances.

An agent, as used in this statute, is one who works for or with the permission of the owner of the premises or place (as I have explained these to you).

If you find that the State has failed to sustain its burden of proving each and every one of the elements of the offense as I have stated them to be, then you must find the defendant not guilty of this offense.

N.B. State v. Soto, 119 N.J. Super. 186 (App. Div. 1972)
Tenant operating a business is an owner under 2A:121-3(c)

State v. Aiello, 91 N.J. Super. 457 (App. Div. 1966)
Re: Ownership and a co-defendant.

State v. Smith, 21 N.J. 326 (1956)

2.221 MANSLAUGHTER

(WHERE THERE IS A SEPARATE INDICTMENT FOR MANSLAUGHTER, USE THE FOLLOWING:)

The indictment charges a violation of N. J. S. A. 2A:113-5. This statutory provision reads in part as follows:

> "Any person who commits the crime of manslaughter shall be punished by....."

and then it states what the maximum penalty is.

There is no claim on the part of the State that the defendant committed the crime of murder. The State does claim, however, that defendant committed the crime of manslaughter.

(REFER TO MODEL FORM MURDER CHARGE FOR SPECIFIC TYPE OF MANSLAUGHTER)

2.221

ANNOTATION

MANSLAUGHTER

The manslaughter charge should be divided into two categories. Although there is no statutory distinction between involuntary and voluntary manslaughter (N. J. S. A. 2A:113-5), the instances of manslaughter do arise in these two distinct factual categories.

Voluntary manslaughter, committed in the heat of passion upon provocation is well described in the current charge.

Involuntary manslaughter, although dealt with in the charge, does not adequately deal with the factual pattern in which this type of manslaughter usually arises--culpable negligenc although it may be useful when the facts indicate.

State v. Weiner, 68 N. J. Super. 468 (App. Div. 1961) is an appeal contesting the temporary suspension of the doctor's license to practice medicine and surgery pending the outcome of a manslaughter indictment. Under N. J. S. A. 45:9-16, the State Board of Medical Examiners may suspend a license upon proof satisfactory to the Board that the holder of such a license has been convicted of crime involving moral turpitude. The Board, in this case, used this as implied authority to temporarily suspend the doctor pending the outcome of the indictment. The court didn't find it necessary to decide whether manslaughter involved a crime of moral turpitude, because there was no

statutory authority to suspend a license because of the pendency of an indictment. The court did however outline the arguments and policy considerations.

In discussing whether manslaughter was a crime involving moral turpitude, the Appellate Division said:

> ....It may be voluntary as a felonious and intentional killing ordinarily committed in a sudden heat of passion, caused by adequate legal provocation, State v. Zellers, 7 N. J. L. 220, 243 (Sup. Ct. 1824), 1 Wharton supra, §274, p. 580, or involuntary, in the commission of an unlawful act or by culpable negligence in performing a lawful act or omitting to perform a legal duty. State v. Blaine, 104 N. J. L. 325 (E. & A. 1928); State v. Brown, 22 N. J. 405, 411 (1956); 1 Wharton, supra, §289, p. 605. The only specific intent required is the intent to do the act resulting in the death, rather than intent to do a harm. State v. Diamond, 16 N. J. Super. 26, 31 (App. Div. 1951). In the area of medical malpractice, manslaughter may be deduced from criminal negligence on the part of a physician or surgeon through gross ignorance of the science practiced and the effect of the remedies employed, gross negligence in the application and selection of remedies, lack of proper skill in the use of instruments, or failure to give proper instructions to the patient as to the use of the medicines.

In the prosecution for manslaughter in State v. Weiner, 41 N. J. 21 (1963) criminal negligence was discussed. In distinguishing civil and criminal negligence the court said that for negligence to be criminal must be an outrage to the state. The standard set down at page 26 is that:

> Negligence to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to

cause death.

The majority reversed the conviction because the State, although it proposed four theories on which the 15 deaths could have been predicated, failed to relate a criminal failure on the part of the defendant to the deaths.

The dissent by Justice Haneman was not based upon the definition of criminal negligence but upon the matter of causation.

In his discussion of criminal negligence, he expands upon the definition above:

> ....Wharton's supra, 611, reads as follows:
>
> "It involves a reckless disregard for human life and is the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the willful creation of an unreasonable risk thereof. There must be negligence of a gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects; or that entire want of care which would raise the presumption of conscious indifference to consequences, or which shows such wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others, which is equivalent to an intentional violation of them."
>
> In Staub v. Public Service Railway Co., 97 N. J. L. 297 (E. & A. 1922), the court said, at p. 300:
>
> "To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to

> discharge some duty which produces the injurious result."

Besides medical malpractice, culpable negligence may arise in child neglect cases. State v. Watson, 77 N. J. L. 299, 301 (1909); State v. Pickles, 46 N. J. 542, 555 (1966).

In Pickles, both parents were prosecuted for statutory neglect and the mother for giving the child a punitive hot bath and subsequent failure to provide medical treatment. The standard to be used at retrial was to be whether her failure to obtain medical attention "constituted conduct of such a reckless or wanton character as to indicate an utter indifference on her part to the life of her son."

The same standard of culpable negligence is, of course, applicable in a case of gross negligence where there is a death. State v. Harrison, 107 N. J. L. 213, 215 (1930). The defendant was a crossing gateman who failed to lower crossing gates for an approaching train to pass. The elements which had to be proved beyond a reasonable doubt:

1. Legal duty.
2. Breach of that duty amounting to gross negligence "in other words, negligence evincing a reckless indifference to or disregard of human life."
3. Injuries were proximately caused.
4. Death was caused by such injuries.

2.222 MISCONDUCT IN OFFICE - N.J.S.A. 2A:85

Misconduct in office or official misconduct as it is sometimes called is a crime in New Jersey.

Misconduct in office is dishonest behavior by a public officer either in the exercise of the duties of his office or while acting under the color of his office. The offense is committed if the officer, in the exercise of the duties of his office or while acting under color of his office, does any act which is wrongful in itself (malfeasance); does any otherwise lawful act in a wrongful manner (misfeasance); omits doing any act which is required of him by the duties of his office (nonfeasance). (CHARGE APPROPRIATE OFFENSE.)

In order for you to find one guilty of misconduct in office, you must find beyond a reasonable doubt that defendant

(1) was a public official; i.e., a (describe office)

(2) who acted dishonestly while engaged in (describe alleged conduct)

(3) while acting in the exercise of the duties of his office or while acting under color of his office.

A public official is anyone who holds a position of public trust. Public officials are under an inescapable obligation to serve the public with the highest fidelity.

It is the burden of the state to show beyond a reasonable doubt that the official was guilty of dishonest conduct, that is,

that he acted with an evil motive or in bad faith. This does not necessarily require financial dishonesty although the use of an opportunity to perform a public duty as a means of acquiring a personal benefit or advantage whould constitute misconduct. It is immaterial whether or not the public official completed whatever undertaking he began. However, if you find that a public official was merely guilty of error in judgment while acting in good faith, he is not guilty of the crime of misconduct in office.

This crime of misconduct may be committed by a public official either through the exercise of the duties of his office or while acting under the color of his office. This means that you do not have to find the defendant's act was one of his enumerated duties. It is enough if you find that he took advantage of his position in such a way as to cause others to rely on the color of his office, that is, his apparent authority or power.

The prescribed duties of an office are nothing more or less than the duties cast by law on the incumbent of the office. The duty may be prescribed by a special or private law or it may arise out of the very nature of the office itself.

1. State v. Weleck, 10 N.J. 355 (1952)
2. State v. Begyn, 34 N.J. 35, 48 (1961)
3. Schlosser, Criminal Laws of New Jersey, §740 (1953)
4. Wharton, Criminal Law & Procedure, §1405

5. State v. Savoie, 67 N.J. 439 (1975)

6. State v. Schultz, 71 N.J. 590 (1976)

Revised: 4/10/78

2.223 MURDER

(Willful, Deliberate and Premeditated)

(Where first degree murder is excluded as a possibility, refer to the charge 2.225 MURDER IN THE SECOND DEGREE, and the MANSLAUGHTER charges for guidance in framing a jury instruction to meet the circumstances of the case under consideration.)

Note: Before using this charge read State v. Gary Robinson and Derek Van Austin, 139 N.J. Super. 475 (App. Div. 1976).

Murder is the unlawful killing of one person by another with malice and without reasonable provocation or justifiable cause or excuse. Malice in this connection does not connote hatred, ill will, or malevolence, although one or more of these may be present. Malice, as I have used the word, means that there must be a concurrence of an evil meaning mind with an evil doing hand.

Malice means either one or both of the following states of mind preceding or co-existing with the act by which death is caused, and it may exist even where that act is unpremeditated:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; or

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.[1]

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[1] State v. Gardner, 51 N.J. 444, 458 (1968)

In New Jersey the crime of murder is divided into two degrees; that is to say, murder in the first degree and murder in the second degree. The statute provides that murders in the first degree are murders which are perpetrated by means of poison, which is not the situation here, or by lying in wait, which is not the situation here, or by any other kind of willful, deliberate and premeditated killing; and other specifically designated unlawful killings not here pertinent. The State contends that this killing was intentional and that it was willful, deliberate and premeditated. Whether it was is for you to decide. I will explain those terms, willful, deliberate and premeditated, to you in a moment. Under the statute all other kinds of murder are murder in the second degree.

The statute provides that the jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree. The law presumes that all unlawful homicides or killings are murders in the second degree. That presumption, of course, is a rebuttable one and it is your province as jurors to determine whether or not the presumption of murder in the second degree has been rebutted, assuming of course you find the defendant committed an unlawful homicide.

Before the presumption arises, however, the State must prove a murder. Murder requires proof of a malicious killing which is unlawful, that is, a killing without justification or excuse.

"Without justification" means that the killing may not have occurred at the command, or with the permission, of the law (as when a police officer kills in discharge of his duties). "Without excuse" means that the killing may not have occurred by accident or in self-preservation. Only when the essential elements of murder have been proved beyond a reasonable doubt does the presumption of murder in the second degree arise.[2] The State's burden of proving, beyond a reasonable doubt, that the homicide was murder includes the burden of proving, beyond a reasonable doubt, that the killing was not accidental, justified or excusable or manslaughter. The State must bear this burden throughout the entire trial and the presumption of murder in the second degree comes into play only after the State has satisfied this mandate.[3]

Now the presumption that an unlawful killing is second degree murder can be rebutted in two ways, upward and downward. It can be rebutted upward by the State showing beyond a reasonable doubt that the killing was first degree murder. It is rebutted downward if the evidence shows that indeed it was not second degree murder but no more than manslaughter.

Now, if the State proposes to raise the criminal responsibility for an unlawful homicide from murder in the second degree to murder in the first degree, the State must sustain the burden of proving beyond a reasonable doubt that the killing of the decedent

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2. State v. Gardner, 51 N.J. 444, 457, 459 (1968)

3. State v. Bess, 53 N.J. 10, 17 (1968)

by the defendant was willful, intentional, and that it was deliberate and premeditated.

Now, what do we mean by a "willful, deliberate and premeditated killing" which the statute describes as murder in the first degree? The statutory language is actually a statement in reverse order of the natural sequence of the required mental operations. The first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word deliberate does not here mean "willful" or intentional" as the word is frequently used in daily conversation or parlance. Rather it conveys the meaning of "deliberation" and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word "willful" signifies an intentional execution of the plan to kill which had been conceived and deliberated upon.

The law does not require that any particular length of time shall intervene between the formation of the design to kill and its ultimate execution. It requires that the design to kill be conceived, that it be deliberated upon, and be willfully executed. If these mental operations did in fact occur, the period of time involved is of no significance; the killing is murder in the first degree.[4]

Whether these three mental operations which I have just described were performed by the defendant are questions of fact for you, the jury, to determine.

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4. State v. Reyes, 50 N.J. 454, 464 (1967)
State v. Washington, 60 N.J. 170, 173 (1972)

Intent to kill is not by itself sufficient to raise second degree murder to first degree murder. All of the other elements -- premeditation, deliberation and willfulness -- must, in addition to intent to kill, be present in order to constitute murder in the first degree.[5]

Now, the intent to take life is not a necessary element required to constitute the crime of murder in the second degree. The intent to do grievous bodily harm is sufficient. If the intent was merely to do the deceased grievous bodily harm, or if the intent was to kill the deceased but the killing was not deliberate or premeditated, then the crime is murder in the second degree.

Murder in the second degree includes all cases of murder which do not constitute first degree. It is distinguished by the absence of one or more of the mental operations of willfulness, deliberateness or premeditation required by the law to constitute murder in the first degree. Thus, where the design or plan is to do grievous bodily harm without an intent to take life, or if the killing be intentionally done but without deliberation or premeditation, or where the act is done in the heat of anger but without reasonable provocation, the crime is murder in the second degree.[6]

[Where the indictment charges murder and the evidence requires the issue of voluntary manslaughter to be sent to the jury, insert the charge on voluntary manslaughter.]

As I have indicated, in order to find the defendant guilty of any of the offenses I have mentioned, the State must prove all the

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5. State v. Ernst, 32 N.J. 567 (1960); State v. Smith, 27 N.J. 433 (195

6. State v. Mathis, 47 N.J. 455, 466 (1966)

essential elements of that offense beyond a reasonable doubt. The State, however, is not required to prove a motive. If the State has proved the essential elements of any of the offenses beyond a reasonable doubt, the defendant must be found guilty of that offense regardless of his motive or the lack of a motive. If the State, however, has proved a motive, you may of course consider that insofar as it gives meaning to other circumstances.[7] On the other hand, the absence of motive may be considered in weighing whether or not the defendant participated in the crime charged.

You will note that I have mentioned the word "intent". The nature of the intent with which the defendant acted toward the decedent is a question of fact for the jury to decide. Intent is a condition of mind. It is not necessary for the State to produce a witness or witnesses who could testify that the defendant stated, for example, that he intended to kill or that he intended to inflict grievous bodily harm. It is within the power of the jury to find that proof of intent has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and circumstances surrounding the conduct under investigation--such things as the place where the acts occurred, the weapon used, the location, number and nature of the wounds inflicted, and all that was done or said by the defendant preceding, connected with, and immediately succeeding the events leading to the death of the decedent are among the circumstances to be considered.

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7. State v. Beard, 16 N.J. 50, 60 (1954)

[(Insert where appropriate) Now, some of the evidence introduced in this case is circumstantial. Circumstantial evidence may be sufficient to convict; indeed in many instances it may be more certain, satisfying and persuasive than direct evidence.

Circumstantial evidence, of course, should be scrutinized carefully, but a conviction may be based on circumstantial evidence alone provided you are convinced of the defendant's guilt beyond a reasonable doubt.[8]]

The essential determination for you to make in regard to murder in the first degree is whether the killing was accomplished with deliberation and premeditation. The State contends that the defendant's action indicated an intent to take life and willfulness, deliberation, and premeditation. These mental operations may be performed at any time along the sequence of events. If they are performed prior to the time the fatal wound was inflicted then a case of first degree murder is made out. The State contends that shortly before the killing, the defendant ... (here insert the State's contentions).

If, after a consideration and comparison of all the evidence, you are convinced beyond a reasonable doubt that prior to inflicting the fatal wound the defendant conceived a design to kill, deliberated upon it, and willfully executed this design to kill, then he is guilty of murder in the first degree.

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8. State v. Fiorello, 36 N.J. 80 (1961)
State v. Dancyger, 29 N.J. 76, 84 (1959)

If any of the mental operations did not occur, then the crime committed would not be murder in the first degree and your attention should then be directed to whether the defendant is guilty of murder in the second degree or manslaughter.

If you conclude beyond a reasonable doubt that the killing was done by the defendant willfully but so suddenly as to preclude premeditation or deliberation, then the degree would be murder in the second degree.

[(Insert where appropriate) As I have already indicated to you, a section of our statutes relative to homicide, provides in its pertinent parts as follows:

> Any person who kills another by misadventure or in his own defense *** is guiltless and shall be totally acquitted and discharged.

No burden of proof is cast upon the defendant in this regard. The burden of proof is upon the State to prove its case beyond a reasonable doubt. If a reasonable doubt as to the guilt of the defendant arises from a consideration of any issue of misadventure, that is, accident, or the issue of self-defense, that doubt must be resolved in favor of the defendant. If you find that such a reasonable doubt exists, there must be an acquittal.

On the other hand, if you are persuaded beyond a reasonable doubt that the killing was not the result of misadventure, or in the defendant's own defense, then you shall consider the remaining issues of the case and determine, on the basis of my instructions to you, what verdict should be returned.]

A homicide or a killing with a deadly weapon, such as (describe the deadly weapon used) in itself would permit you to draw an inference that there was an intention to take life. A deadly weapon is one liable to produce death or great bodily injury.[9] In your deliberations you may consider the weapon used and the manner and circumstances of the killing, and if you are satisfied beyond a reasonable doubt that the defendant (shot) (stabbed) and killed the decedent with a (gun) (knife) you may draw an inference from the weapon used, that is, the (gun) (knife) and from the manner and circumstances of the killing, as to deliberation and premeditation.[10]

If you find this defendant guilty of murder, your verdict must designate whether you have found him guilty of murder in the first degree or murder in the second degree (or manslaughter where appropriate).

NOTE:

In Mullaney v. Wilbur, 421 U.S. 684, (1975) the Supreme Court ruled that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, including the absence of heat of passion on sudden provocation when the issue is properly presented. Thus, when the indictment charges murder, but the evidence requires that the issue of voluntary manslaughter be presented to the jury, the burden of proof does not shift to the defense on the issue of adequate provocation; once an arguable issue of provocation arises from the proofs, the burden is on the State to disprove it beyond a reasonable doubt.

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9. State v. Jones, 115 N.J.L. 257, 262 (E.&A. 1935)

10. State v. Bucanis, 26 N.J. 45, 54 (1958); State v. Beard, 16 N.J. 50, 61 (1954)

a.

VOLUNTARY MANSLAUGHTER

Although the crime of voluntary manslaughter is not mentioned in the indictment, you have a right and a duty to consider that offense.

Voluntary manslaughter is an unlawful intentional homicide, that is, an unlawful intentional killing of a person, done in sudden passion or heat of blood, resulting from a reasonable provocation, without malice aforethought.[1] You will notice, members of the jury, malice distinguishes murder from manslaughter.[2] In manslaughter there is no malice and in murder (whether murder in the first degree or murder in the second degree) there is malice, and I have explained to you what malice is.

If you find beyond a reasonable doubt that the defendant did intentionally kill the deceased but that the killing occurred during the heat of a passion resulting from a reasonable provocation--a passion which effectively deprived the defendant of the mastery of his understanding -- a passion which was acted upon before a time

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a. Where the indictment charges murder and the evidence requires the issue of voluntary manslaughter to be sent to the jury.

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1. State v. Bonano, 59 N.J. 515, 523 (1971);

   1 Wharton, Criminal Law and Procedure (Anderson ed. 1957), Sec. 272.

2. State v. Brown, 22 N.J. 405, 410-411 (1956).

sufficient to permit reason to resume its sway had passed -- then the crime is mitigated or reduced from murder to manslaughter.[3]

In this connection, you must keep in mind that provocation in law has a fixed meaning. If there was provocation of such character as is recognized by the law and it was acted upon under circumstances which the law recognizes, then the crime is manslaughter.

Now, what does the law recognize as provocation which would permit you jurors to find that the offense is manslaughter rather than murder in the second degree? First, mere words alone, or looks or gestures no matter how abusive, threatening or insulting are never such provocation.[4]

Provocation in law must be such as in the opinion of the jury would probably throw the mind of an average man of ordinary self-control into a state of uncontrolled rage or anger. The provocation must be so gross as to cause the ordinary reasonable man to lose his self-control and to use violence with fatal results, and the defendant must in fact have been deprived of his self-control

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3. State v. King, 37 N.J. 285, 300 (1962);
State v. Fair, 45 N.J. 77, 96 (1965);
State v. Bonano, 59 N.J. 515, 523 (1971).

4. State v. King, 37 N.J. 285, 301 (1962);
State v. Bonano, 59 N.J. 515, 534 (1971).

under the stress of such provocation and must have committed the crime while so deprived.[5]

The provocation must be of such character and so close upon the act of killing that for the moment the defendant could not be considered as the master of his own understanding. If such an interval of time elapsed between the provocation and the killing as is reasonably sufficient for reason to resume control, the offense may not then be considered reduced to manslaughter. Whether the provocation was sufficient or not, and whether the time which elapsed between the provocation given and the act of killing was sufficient or not for the accused to subdue or control his emotions are questions of fact to be determined by the jurors on consideration of all the evidence in the case.[6]

You will note that I have referred to voluntary manslaughter as an "intentional homicide", that is, an "intentional" killing.

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5. State v. McAllister, 41 N.J. 342, 353 (1964)

6. State v. King, 37 N.J. 285, 300 (1962);
State v. Guido, 40 N.J. 191, 209 (1963);
State v. Smith, 43 N.J. 67, 76 (1964);
State v. Gosser, 50 N.J. 438, 453 (1967).

As to what is an intent, I charge you that it is a condition of the mind which cannot be seen, and can only be determined by reference to conduct or from inferences from conduct, words or acts. It means the purpose to do something or resolve to do a particular act or to accomplish a certain thing. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he allegedly engaged in a particular act. His intention may be gathered from his acts and his conduct, if any, and from all of the surrounding circumstances that existed at the time and place.

Intent (See Model Charges) as a separate proposition for proof does not commonly exist. It must ordinarily be discovered, as other mental states are, in the evidence of the defendant's conduct in the surrounding circumstances.[7]

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7. State v. Costa, 11 N.J. 239, 246-247 (1953).

INVOLUNTARY MANSLAUGHTER[a]

Although the crime of manslaughter is not mentioned in the indictment, you have a right and duty to consider that offense.

Manslaughter is defined as the unlawful killing of another human being without malice.

Manslaughter is distinguished from the crime of murder by the absence of malice as that term has already been defined. Malice is the very essence of the crime of murder, whether it be first or second degree murder, and it is essential that the State prove malice beyond a reasonable doubt in order for you to find the defendant guilty of any type of murder; but the State has no obligation to prove malice in order to establish the crime of manslaughter.

(IF INVOLUNTARY MANSLAUGHTER NOT INVOLVING GROSS NEGLIGENCE, STATE THE FOLLOWING:)

The crime of manslaughter is the unlawful killing of a person where the death results unintentionally so far as the person charged with the crime is concerned from an act committed by him with the intention to do less than great bodily harm and that would necessarily mean less than the intent to kill. Accordingly, if you find beyond a reasonable doubt that defendant did kill the deceased but that it was done when he had the intention to do less than great bodily harm and that would necessarily mean less than the intent to kill, the crime is manslaughter and you should find the defendant guilty of manslaughter.

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[a] If there is a separate manslaughter indictment, see separate charge on manslaughter.

(IF INVOLUNTARY MANSLAUGHTER INVOLVING GROSS NEGLIGENCE, STATE THE FOLLOWING:)

The crime of manslaughter is the unlawful killing of a person where death results unintentionally so far as the person charged with the crime is concerned from a grossly negligent act on his part. For the defendant to be guilty of manslaughter he must have the specific intent to do the act resulting in death but he need not have the specific intent to do harm.

Accordingly, to find the defendant guilty of manslaughter, you must find, beyond a reasonable doubt, that the defendant intended to do the act which resulted in death[1], that the act in question did in fact cause the decedent's death, and that the act which resulted in death was one that was grossly negligent, that is, the negligence must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death.[2-3]

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1 State Board of Medical Examiners v. Weiner, 68 N.J. Super. 468, 486 (App. Div. 1961)

2 State v. Watson, 77 N.J.L. 299, 301 (Sup. Ct. 1909) (Failure to provide medical attendance to child)
State v. Pickles, 46 N.J. 542, 555 (1966) (Child neglect, utter indifference to the life of her son)
State v. Weiner, 41 N.J. 21, 26, 43-4 (1963) (Medical malpractice)
State v. Harrison, 107 N.J.L. 213, 215 (Sup. Ct. 1930) (Railroad crossing guard - negligence evincing a reckless indifference to or disregard of human life)

3 Refer to proximate cause charge, if needed (civil charge 7.11 et seq.) In some cases the focus may be exclusively on gross negligence and further explanation of causation need not be made. In other cases a full charge on causation and intervening cause may be necessary. See State v. Weiner, 41 N.J. 21, 36 (1966).

2.224 FELONY (ROBBERY) MURDER

The State contends that the defendant was at the time (engaged in the commission of) (aiding and abetting another or others in the commission of) a robbery. A homicide or killing which occurs while a person is perpetrating a robbery is commonly known as a felony murder. Under the statutes of our State, such a killing constitutes murder in the first degree.

In regard to the State's contention that the homicide or killing of the decedent was committed while the defendant (and another or others) (was) (were) committing a robbery: A New Jersey Statute (N.J.S. 2A:113-1) insofar as it is here pertinent, reads in part, as follows:

> If any person, in committing or attempting to commit robbery, or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, kills another, or if the death of any one ensues from the committing or attempting to commit any such crime or act, then such person so killing is guilty of murder.[1]

Another section of the New Jersey Statutes (2A:113-2) provides in pertinent part as follows:

> Murder which is committed in perpetrating or attempting to perpetrate robbery, is murder in the first degree.

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1. 2A:113-1

[(Insert where appropriate) Now, another section of our criminal law (N.J.S. 2A:85-14) provides in pertinent part as follows:

> Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.

This provision means that not only is the person who actually commits the criminal act responsible for it, but those who are aiding and abetting are also responsible.

The word "aid" as contained in the statute means to assist, support or supplement the efforts of another, and the word "abet" means to encourage, counsel, incite or instigate the commission of a crime. If you find that the defendant willfully and knowingly aided or abetted another or others in the commission of the offense you must consider him a principal.

Concerted action does not have to be proved by direct evidence of a formal plan to commit a crime, verbally concurred in by all that are charged. The proof may be circumstantial. Participation and acquiescence can be established from conduct as well as spoken words.

If you find beyond a reasonable doubt that the defendant and another or others, (namely,) acted in concert with intent to rob the decedent at (place) on (date) and that one or more of them did in fact rob the decedent, that is, did in fact commit a robbery

there, then the act or acts of the others in the commission of the robbery are chargeable to the defendant.]

I will now explain to you the law applicable to a murder alleged to have been committed in the perpetrating of a robbery. In doing this, I will first explain to you what the law means by the term "robbery".

Robbery is defined by our statute as a forcible taking from the person of another of money or personal goods and chattels, of any value whatever, by violence or putting him in fear. To constitute robbery, therefore, there must be a forcible taking of the money or property of another from his person or from his custody with intent to steal, that is, with intent to permanently deprive him of the money or property, and the taking must be by means of violence or such demonstration or threats as will create in the victim a reasonable apprehension of bodily injury if he should resist. To satisfy this latter requirement it is enough that so much force or threats or demonstrations were used as to create in the victim an apprehension of danger to induce him to part with money or property against his will. It is essential that the defendant accomplish the taking of the property by means of force or violence or by intimidating or putting the victim in fear. The requirement is stated in the disjunctive so that the offense is committed if violence or fear is present, though not both.

There are three elements which the State must prove to your satisfaction beyond a reasonable doubt in order to establish that this defendant was engaged in the commission of a robbery at the time this killing took place:

1. That on (date) at (place) in this County, the defendant willfully and knowingly (forcibly took) (aided and abetted _____ in forcibly taking) from the person of the decedent, money, (or other property) the property of the decedent;

2. That this forcible taking of this money (property) was against the will of the decedent and was accomplished by violence or putting the decedent in fear; and

3. That this money (property) was taken and carried away with intent on the part of the (defendant) (participants) to deprive the decedent of his money (property) permanently.

You will notice that I have used the phrase "with intent". As to what is an intent, I charge you that it is a condition of the mind which cannot be seen, and can only be determined by reference to conduct or from inferences from conduct, words or acts. It means the purpose to do something or resolve to do a particular act or to accomplish a certain thing. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he allegedly engaged in a particular act. His intention may be gathered from his acts and his conduct, if

any, and from all of the surrounding circumstances that existed at the time and place, that is, on (date) in (place).

Intent must ordinarily be discovered, as other mental states are, in the evidence of the defendant's conduct in the surrounding circumstances.[2]

When a killing occurs in the commission of a robbery, it is murder in the first degree, even though death was not intended. Therefore, in such a case, the state is not under any duty to prove a willful, deliberate, and premeditated killing.

In order for you to find the defendant guilty of murder in the first degree, the state must prove all of the essential elements of a felony murder beyond a reasonable doubt. Accordingly, before you can find the defendant guilty of murder in the first degree, the state must prove to your satisfaction beyond a reasonable doubt that a robbery of the decedent occurred at (place) on (date); that the defendant willfully and knowingly (committed) (aided and abetted _____ in committing) the robbery; and that the fatal wounding of the decedent occurred sometime within the course of the robbery, including its aftermaths of escape and concealment efforts.[3]

It is your duty and your function to determine what was in the mind of the defendant at the time this alleged murder took

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2. State v. Costa, 11 N.J. 239, 246-247 (1953)

3. State v. Holland, 59 N.J. 451, 458 (1971)

place. If you do not find that at the time of the alleged murder the defendant had formed the intent to rob the decedent, then it follows that the State has failed to prove the defendant guilty of a felony murder and the defendant could not then be found guilty of a felony murder.

In a felony murder, when two or more persons agree to rob another and only one strikes the fatal blow, all are guilty. All actually taking part in the perpetration of the felony, that is, the robbery, are treated alike, even though one be not physically present at the scene, and every person aiding and abetting in its commission is responsible for the consequences as a principal to the same extent as the actual murderer.[4]

When, incident to a robbery, one of the robbers kills the victim after the victim's money is taken from his possession, the killing being done in an attempt to conceal the crime and protect the robbers in the possession of the loot and facilitate their flight, the killing is murder committed in the perpetration of a robbery within the meaning of the statute and is consequently murder in the first degree.[5]

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4. State v. Smith, 32 N.J. 501, 521 (1960)

5. State v. Holland, 59 N.J. 451, 458 (1971)

Approved: 4/10/78

2.225 MURDER IN THE SECOND DEGREE

Murder is the unlawful killing of one person by another with malice and without reasonable provocation or justifiable cause or excuse. Malice in this connection does not connote hatred, ill will, or malevolence, although one or more of these may be present. Malice, as I have used the word, means that there must be a concurrence of an evil meaning mind with an evil doing hand.

Malice means either one or both of the following states of mind preceding or co-existing with the act by which death is caused, and it may exist even where that act is unpremeditated:

(a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; or

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.[1]

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1. State v. Gardner, 51 N.J. 444, 458 (1968)

Murder requires proof of a malicious killing which is unlawful, that is, a killing without justification or excuse. "Without justification" means that the killing may not have occurred at the command, or with the permission, of the law (as when a police officer kills in discharge of his duties). "Without excuse" means that the killing may not have occurred by accident or in self-preservation. The State's burden of proving, beyond a reasonable doubt, that the homicide was murder includes the burden of proving, beyond a reasonable doubt, that the killing was not accidental, justified or excusable or manslaughter.

The intent to take life is not a necessary element required to constitute the crime of murder in the second degree. The intent to do grievous bodily harm is sufficient. If the intent was merely to do the deceased grievous bodily harm or if the intent was to kill the deceased without justification or excuse, then the crime is murder in the second degree.

[Where the indictment charges murder and the evidence requires the issue of manslaughter to be sent to the jury, insert the appropriate charge on manslaughter.]

As I have indicated, in order to find the defendant guilty of any of the offenses I have mentioned, the State must prove all the essential elements of that offense beyond a

reasonable doubt. The State, however, is not required to prove a motive. If the State has proved the essential elements of any of the offenses beyond a reasonable doubt, the defendant must be found guilty of that offense regardless of his motive or the lack of a motive. If the State, however, has proved a motive, you may of course consider that insofar as it gives meaning to other circumstances.[2] On the other hand, the absence of motive may be considered in weighing whether or not the defendant participated in the crime charged.

You will note that I have mentioned the word "intent". The nature of the intent with which the defendant acted toward the decedent is a question of fact for the jury to decide. Intent is a condition of mind. It is not necessary for the State to produce a witness or witnesses who could testify that the defendant stated, for example, that he intended to kill or that he intended to inflict grievous bodily harm. It is within the power of the jury to find that proof of intent has been furnished beyond a reasonable doubt by inferences which may arise from the nature of the acts and circumstances surrounding the conduct under investigation--such things as the place where the acts occurred, the weapon used, the location, number and nature of the wounds

2. State v. Beard, 16 N.J. 50, 60 (1954)

inflicted, and all that was done or said by the defendant preceding, connected with, and immediately succeeding the events leading to the death of the decedent are among the circumstances to be considered.

[(Insert where appropriate) Now, some of the evidence introduced in this case is circumstantial. Circumstantial evidence may be sufficient to convict; indeed in many instances it may be more certain, satisfying and persuasive than direct evidence.

Circumstantial evidence, of course, should be scrutinized carefully, but a conviction may be based on circumstantial evidence alone provided you are convinced of the defendant's guilt beyond a reasonable doubt.[3]]

[(Insert where appropriate) As I have already indicated to you, a section of our statutes relative to homicide, provides in its pertinent parts as follows:

> Any person who kills another by misadventure or in his own defense *** is guiltless and shall be totally acquitted and discharged.

(Here charge self defense if appropriate)

No burden of proof is cast upon the defendant in this regard. The burden of proof is upon the State to prove its case beyond a reasonable doubt. If a reasonable doubt as to the guilt of the defendant arises from a consideration of any issue of

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3. State v. Fiorello, 36 N.J. 80 (1961)
State v. Dancyger, 29 N.J. 76, 84 (1959)

[misadventure, that is, accident, or the issue of self-defense, that doubt must be resolved in favor of the defendant. If you find that such a reasonable doubt exists, there must be an acquittal.

On the other hand, if you are persuaded beyond a reasonable doubt that the killing was not the result of misadventure, or in the defendant's own defense, then you shall consider the remaining issues of the case and determine, on the basis of my instructions to you, what verdict should be returned.]

A homicide or a killing with a deadly weapon, such as (describe the deadly weapon used) in itself would permit you to draw an inference that there was an intention to take life. A deadly weapon is one liable to produce death or great bodily injury.[4] In your deliberations you may consider the weapon used and the manner and circumstances of the killing, and if you are satisfied beyond a reasonable doubt that the defendant (shot) (stabbed) and killed the decedent with a (gun) (knife) you may draw an inference from the weapon used, that is, the (gun) (knife) and from the manner and circumstances of the killing, as to intent to take life.[5]

If you find this defendant guilty, your verdict must

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4. State v. Jones, 115 N.J.L. 257, 262 (E.&A. 1935)

5. State v. Bucanis, 26 N.J. 45, 54 (1958);
State v. Beard, 16 N.J. 50, 61 (1954)

designate whether you have found him guilty of murder (or manslaughter where appropriate).

NOTE:

In Mullaney v. Wilbur, 421 U.S. 684, (1975) the Supreme Court ruled that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, including the absence of heat of passion on sudden provocation when the issue is properly presented. Thus, when the indictment charges murder, but the evidence requires that the issue of voluntary manslaughter be presented to the jury, the burden of proof does not shift to the defense on the issue of adequate provocation; once an arguable issue of provocation arises from the proofs, the burden is on the State to disprove it beyond a reasonable doubt.

In State v. Wyatt, 154 N.J. Super. 339 (App. Div. 1977), it was held to be plain error to charge a jury concerning the presumption of second degree murder where first degree murder is excluded as a possibility and the only theories of conviction offered to the jury are second degree murder and manslaughter.

2.240 OBTAINING MONEY OR PROPERTY BY FALSELY PRETENDING TO BE POOR OR UNEMPLOYED (N.J.S.A. 2A:111-2) [WELFARE FRAUD]

This statute makes it a crime for any person to knowingly or designedly obtain money (property or other thing of value) for himself or for any other person, from any agency or organization (of the type listed in the statute) (such as a County Welfare Board) under the pretense that he, or such other person is poor and needy (or out of employment) by means of either one or both of two separate and distinct types of conduct.

The first type is by means of any false statement whether made orally or in writing; and the second type is by means of concealing or failing to disclose a material fact which it is his duty to reveal.

If you find that the defendant did knowingly or designedly obtain money (property or other thing of value) for himself, or for any other person from (the County Welfare Board) under the false pretense that he or such other person was poor and needy (or out of employment) by either type of means, the crime has been committed.

The first type of means is accomplished when the defendant has made an affirmative statement, either orally or in writing, which was false. "Falsity" in this section means that the statement must not only be false in fact but that the defendant knew that it was false. The second type of means is accomplished when a defendant has concealed or failed to disclose a material fact which it was his duty to reveal. In order for you jurors to find the defendant guilty

of using the second means, you must find beyond a reasonable doubt:

(a) That the defendant had a duty to reveal such fact;

(b) That such fact was a "material" fact, which word as used in this statute means something important, a significant fact upon which the agency relied in dispensing its money or property; and

(c) That the defendant knowingly and designedly concealed or failed to disclose such fact.

The terms "knowingly" and "designedly" include an intent to cheat or defraud even though not stated in the statute.

(NOTE: ONLY CHARGE IN ACCORDANCE WITH THE MEANS ALLEGED IN THE INDICTMENT, I.E., IF THE MEANS ALLEGED IS FALSE STATEMENT, DO NOT CHARGE CONCEALING OR FAILING TO DISCLOSE A MATERIAL FACT, ETC. AND VICE VERSA)

Therefore, from a reading of the statute and the indictment, we see that the elements that the State must prove beyond a reasonable doubt in order for you to find this defendant guilty are as follows:

1) That the defendant obtained money (property or other thing of value) from the (County Welfare Board or other appropriate agency) for (himself, herself and/or for any other person) under the pretense that (he, she or they) was (were) poor and needy (or out of employment). A "pretense" is a claim made or implied; one

especially not supported by fact. Thus, a "false pretense" is such a designed or purposeful misrepresentation of an existing fact or condition as induces the party or agency to whom it is made to part with its property;

2) That the defendant made a false statement or statements, orally or in writing; or that the defendant concealed or failed to disclose a material fact which it was (his or her) duty to reveal, as those terms have been defined and explained to you; (only charge the appropriate means)

3) That the defendant made the false statements, or concealed or failed to disclose the material fact, knowingly and designedly. "Knowingly" means that the defendant had a conscious awareness of what (he or she) was doing as opposed to a mere lack of regard or care. It refers to the state of mind of the defendant; that (he or she) did the acts complained of with awareness and knowledge of what (he or she) was doing. "Designedly" means purposely, that is, willfully, intentionally and voluntarily of defendant's own free will. It means to conceive and plan out in the mind; that it was a deliberate project or scheme which was planned out in the defendant's mind. The State contends that the defendant made such false statements and/or concealed or failed to disclose such material facts knowingly and designedly with intent to cheat or defraud the (County Welfare Board). An intent to cheat or defraud is a necessary element which the State must prove beyond a

reasonable doubt before you can find the defendant guilty.

Whether the defendant's conduct was knowing and designed and whether (he or she) intended to cheat or defraud, are all conditions of the mind. In other words "knowledge", "design" and "intent" all involve the state of mind of the defendant. Such proof ordinarily can only be established by the words, acts and conduct of the defendant. It is not necessary that witnesses be produced to testify that the defendant said that (he or she) had a certain knowledge or acted with a certain design, or had a certain intent to cheat or defraud, when (he or she) engaged in the particular act. The defendant's knowledge, design and intent may all be gathered from (his or her) acts, words and conduct; from all that (he or she) said and did and from all of the surrounding circumstances before, during and after the events in question;

(Here refer to some of the facts that go to the question of knowledge, design and intent).

4) That the (County Welfare Board or the appropriate agency) relied upon the false statements made by the defendant and/or the concealment or failure by the defendant to disclose material facts which the defendant was under a duty to reveal and that the (County Welfare Board) was thereby deceived into giving the defendant the sum of money (property or other thing of value) that (he or she) was not entitled to receive. While the amount of money alleged to have been received by the defendant is set forth

in the indictment, it is not essential that you find the specific amount actually received, so long as you find that some amount was was received by the defendant that (he or she) was not entitled to receive.

WELFARE FRAUD - CASES

1. State v. Kaufman, 18 N.J. 75 (1955)
2. State v. Allen, 53 N.J. 250 (1969) affirming Judge Collester's dissent at 100 N.J. Super. 407, 419 (App. Div. 1968)
3. State v. Greco, 29 N.J. 94 (1959)
4. State v. Zweillmon, 112 N.J. Super. 6 (App. Div. 1970)
5. State v. Graves, 60 N.J. 441 (1972)
6. State v. Lamoreaux, 13 N.J. Super. 99 (App. Div. 1951)

2.241 Obtaining Money, Property etc. by False Pretense (N.J.S.A. 2A:111-1)

The defendant is charged with a violation of N.J.S.A. 2A:111-1 which provides that any person who, knowingly or designedly, with intent to cheat or defraud any other person, obtains any money, property, security, gain, benefit, advantage or other thing of value by means of false promises, statements, representations, tokens, writings or pretenses, is guilty of a violation of the law.

In this prosecution for obtaining money by false promises (pretenses) the State has the duty of showing that this defendant obtained the sum of $_____, or some part of that sum, from the complaining witness by means of false promises (pretenses), that is, that he would waterproof the complaining witness's basement (or as the case may be), and that such promises (pretenses) were made knowingly and designedly with

intent to cheat and defraud the complaining witness of the money.

A violation of this statute arises from the existence of an intention not to perform that was present when the promise (pretense) is made. Consequently, in a prosecution of this type, it must be established beyond a reasonable doubt that at the time of entering into the transaction the accused intended to cheat the complaining witness by taking his money with full awareness that he had no intention of performing the contract.

A conviction for obtaining money under false promises (pretenses) can not rest upon the mere failure of the accused to perform a contract after receiving money. There must be evidence beyond a reasonable doubt pointing to the falsity of the promises (pretenses) at the time they were made and on the basis of which the money was obtained, that is, that he had no intention of performing the work (or as the case may be). An intention not to perform formulated after the promise (pretense) and after receipt of the consideration therefor would not create the criminal liability contemplated by the statute. Therefore, a fraudulent intent is necessary to ripen a mere misrepresentation into a criminal act. Further, the State must establish reliance thereon

by the complaining witness, that is, you must be satisfied that the complaining witness believed the representation made by defendant and that he was influenced by it to part with his money.

(Here Insert Basic INTENT Charge)

A "promise" within this section is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future; it is normally a stipulation for some future conduct by the promisor and is an express undertaking or agreement to carry a purpose into effect, and is necessarily an assertion of an existing state of mind and a present intention to perform. The statutory crime based upon a false promise refers to the existing adverse state of mind of the promisor, i.e., the present intention or existing state of mind of the declarant not to perform. A "false pretense" within this section is such a designed misrepresentation of an existing fact or condition as induces the party to whom it is made to part with his money.

"Falsity" in this section means that the statement was not only false in fact but was false to the knowledge of the defendant, and the burden of proving guilty knowledge is on the prosecution.

"Knowledge" means a conscious awareness as opposed to mere lack of care or regard. Knowledge need not be proven by direct evidence, but rather knowledge may be found from the defendant's conduct, actions and statements as well as the surrounding circumstances.

To summarize, the State must prove beyond a reasonable doubt all of the following elements:

1. That a representation was made;
2. That the representation was false when made;
3. That the representation was made with knowledge that it was false;
4. That the representation was made with the intention to deceive the person to whom it was made and to induce that person to part with his money;
5. That such person to whom the representation was made relied on it and was, in fact, deceived; and
6. That such person was, as a direct result, influenced to part with his money.

Approved: 9/1/76

2.241(a) FRAUDULENT DISPOSITION OF PERSONAL PROPERTY SUBJECT TO SECURITY INTEREST (N.J.S.A. 2A:111-21.1)

The defendant is charged with a violation of N.J.S.A. 2A:111-21.1 which provides in pertinent part that:

> "Any person who is in possession of personal property which is subject to a security interest and who, with knowledge of the security interest, and without the consent of the holder of the security interest, and with intent to cheat or defraud the holder of the security interest, secretes, destroys, sells or exchanges the property which is subject to the security interest, is guilty of a ... [crime].

Under this statute, any person in possession of personal property subject to a security interest who knowingly, without the consent of the holder of the security interest and with intent to cheat or defraud said holder, secretes, destroys, sells, or exchanges the property which is subject to the security interest is guilty of a crime.

In this type of case the State has the duty of showing beyond a reasonable doubt:

(1) that this defendant possessed personal property subject to a security interest.

N.J.S.A. 2A1.111-21.1 defines "security interest" as

> "an interest in personal property which secures payment or performance of an obligation, and includes interests created by or evidenced by contract or agreement, including pledge, assignment, chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, equipment lease and security agreement."

Personal property, generally speaking, includes everything which is the subject of ownership not coming under denomination of real estate (tractors, trucks, etc. which are mentioned in this indictment) would be included in personal property.

(Model charge on Possession, No. 4.251)

(2) that defendant had knowledge of the security interest. By knowledge is meant that defendant had a conscious awareness of what he was doing as opposed to a mere lack of regard or care. It refers to the state of mind of defendant that he did the act or acts complained of with awareness and knowledge of what he was doing. Such proof ordinarily can only be established by the words, acts and conduct of the defendant. It is not necessary that witnesses be produced to testify that defendant said he had a certain knowledge when he engaged in the particular act. Defendant's knowledge as I have just stated may be gathered from his words, acts and conduct and from all he said and did and from all of the surrounding circumstances before, during and after the events in question.

(3) that defendant, without the consent of the holder of the security interest and with intent to cheat or defraud said holder, secreted, destroyed sold or exchanged the property subject to the security interest. An intent to cheat or defraud is a necessary element which the State must prove beyond a reasonable doubt before you can find the defendant guilty.

(Model charge on Intent No. 4.181)

N.B. (Here, if appropriate, refer to some of facts that go to the question of knowledge and intent.)

See State v. Moldenhauer, 103 N.J.L. 238 (Sup. Ct. 1927)

2.250 POSSESSION OF BURGLAR'S TOOLS

The State accuses the defendant of the crime of possessing [or manufacturing]* burglar's tools. N.J.S.A. 2A:94-3 states:

> "Any person who manufactures or knowingly possesses any engine, machine, tool or implement adapted or designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted or designed for such purpose, with intent to use or employ or allow the same to be used or employed for that purpose is guilty of" a violation of law.

Before you may find the defendant guilty, you must find beyond a reasonable doubt, the existence of all of the following essential facts:

(1) That on or about the _____ day of _____, 19___, and in _____, N. J., the defendant had in his possession an engine, machine, tool or implement. The possession may be actual or constructive. I will define actual and constructive possession later.

(2) That the particular implement was adapted or designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property. The terms "adapted" or "designed" mean capable of use in breaking and entering, and such tools must either be "adapted," that is, capable of being used in breaking and entering, or must be "designed," that is, contrived or suitable to be employed for such purpose.

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* Where appropriate substitute "manufacture" for "possession."

(3) That the defendant had knowledge at the time and place of such possession of the character of such implements, that is, the defendant knew they were adapted or designed for the purpose of breaking and entering for the unlawful purpose just described to you.

(4) That the defendant possessed the implements, with the actual specific intent to use or employ, or allow the same to be used or employed for the purpose of cutting through, forcing or breaking open any building, room, vault, safe or other depository in order to steal therefrom money or other property. Stealing here means the unlawful taking by one person of the money or property of another without the right to do so and without the consent of the owner, with the intent to deprive the owner of the property permanently. There must be proof of some circumstance or circumstances, in addition to the proof of the possession of the implement itself, for you to draw a legitimate inference of the required intent.

You will note that the acts charged in the indictment are alleged to have been done "knowingly." The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reason.

(5) CHARGE SPECIFIC INTENT - See Model Criminal Charges.

(6) CHARGE DEFINITION OF - POSSESSION - See Model Criminal Charges.

2.250 ANNOTATIONS

Possession of burglar's tools may be either a high misdemeanor, N.J.S.A. 2A:94-3 or a disorderly person's offense, N.J.S.A. 2A:170-3.

The disorderly person's offense, N.J.S.A. 2A:170-3, requires for a finding of guilt that the tool be on the person of the defendant with the intent to break and enter any building.

The high misdemeanor, N.J.S.A. 2A:94-3, requires for a finding of guilt that the tool be in the possession of the defendant, and that possession may be actual or constructive, with the intent to cut through, force or break open any building, room, vault, safe or other depository in order to steal money or other property.

2A:94-3. MANUFACTURING OR POSSESSING BURGLAR'S TOOLS

Any person who manufactures or knowingly possesses any engine, machine, tool or implement adapted or designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted or designed for such purpose, with intent to use or employ or allow the same to be used or employed for that purpose, is guilty of a high misdemeanor.

State v. Klein, 91 N. J. Super. 509 (App. Div. 1966) held that an automobile fell within the "other depository" phrase of the statute.

2A:170-3. CARRYING WEAPONS OR BURGLAR TOOLS WITH INTENT TO BREAK AND ENTER OR ASSAULT; PRESENCE IN OR NEAR BUILDINGS OR OTHER PLACES WITH INTENT TO STEAL

Any person who has upon him any picklock, key, crow, jack, bit or other implement, with intent to break and enter into any building, or has upon him any offensive or dangerous weapon, with intent to assault any person, or is found in or near any premises used for dwelling, business or storage purposes, or in any place of public resort or assemblage for business, travel, worship, amusement or other lawful purpose, with intent to steal any goods or chattels, is a disorderly person. State v. Wean, 86 N.J. Super. 283 (App. Div. 1965) dealt with this statute.

Any device adapted or designed for use in effecting burglarious entry, and knowingly manufactured or possessed for that unlawful purpose, is a burglary tool. A putty knife is such a tool, State v. Agnesi, 92 N.J.L. 53 (Sup. Ct. 1918), aff'd. per cur. 92 N.J.L. 638 (E. & A. 1918); a jimmy is a burglary tool, State v. Walsh, 9 N.J. Super. 43 (App. Div. 1950); a key opener or key turner; an instrument which will turn a lock without a key; a tool which will open the latch in windows; three screwdrivers in one; a jimmy capable of opening drawers or doors; a bunch of skeleton keys for opening any door and a bunch of common keys, all contained in a bag in possession of the accused were ruled to be burglary tools, Brown v. Menzel, 136 N.J.L. 233 (Sup. Ct. 1948).

A jimmy, a sledge hammer, a chisel, a small cold chisel and two small crowbars, all in the actual or constructive possession of two intended burglars, have been held to be burglary tools, State v. Salernitano, 27 N.J. Super. 537 (App. Div. 1953). A sharpened screwdriver, five car keys and a house key are burglar's tools, State v. Klein, 91 N.J. Super. 509 (App. Div. 1966).

Useful material on this subject may be found in Criminal Laws of New Jersey (3rd Edition), §§ 26:19-26:26; Wharton's Criminal Law & Procedure, § 437; and in an Annotation: "Construction and application of statute relating to burglars' tools," 103 A.L.R. 1313, which deals with two kinds of statutes, the first requiring only a general intent to burglarize, the latter requiring a specific intent and it should be noted that New Jersey falls into the second category.

Approved: 5/20/75

2.251 POSSESSION OF A DANGEROUS KNIFE

The defendant is charged with the offense of possession of a dangerous knife.

The pertinent part of the statute upon which this indictment is based, reads as follows:

> ...[a]ny person who carries, holds or possesses in any automobile, carriage, motor cycle or other vehicle, or on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area:
>
> * * *
>
> c. Any dangerous instrument of the kinds known as a blackjack, slung shot, billy, sandclub, sandbag, bludgeon, metal knuckles, cestus or similar leather band studded with metal for fitting on the knuckles, loose wool impregnated with metal filings, or razor blades imbedded in wood slivers, dagger, dirk, dangerous knife or knife as defined in chapter 5 of the laws of 1952 (C. 2A:151-62), stiletto, grenade, bomb or other explosive, other than fixed ammunition, except as such person may be licensed to carry, hold or possess explosives under the provisions of Title 21 of the Revised Statutes and amendments thereto, is guilty of a... [crime]. N.J.S.A. 2A:151-41 (Emphasis added).

In order for a defendant to be found guilty of this charge it is necessary that the State prove each element of the offense beyond a reasonable doubt. The elements are:

(1) That the defendant intentionally possessed the knife in evidence, (See note.*)

(2) That State's Exhibit_____is a dangerous knife.

(IF POSSESSION IS AN ISSUE IN THE CASE, INSERT HERE THE STANDARD CHARGE ON POSSESSION)

(IF NECESSARY DEFINE INTENT)

Obviously, ladies and gentlemen of the jury, the possession of a knife is not automatically a criminal offense. There are various kinds of knives which are commonly carried for personal utility, convenience or for some other lawful purpose and this would not be in violation of the law.

Whether a particular knife is a dangerous knife under the statute depends upon the purpose of possession and that purpose can only be determined from the facts and circumstances surrounding the possession of that knife.

A knife, which is not dangerous in and of itself, becomes a "dangerous knife" if the purpose of its possession is its use as a weapon. Whether the possessor regards the knife as a defensive weapon or an offensive weapon is of no consequence.

Therefore, whether possession of a knife is a prohibited act under the statute depends upon a determination of the purpose of such possession at the time and place in question.

If the purpose is its use, at any time as a weapon against another person, then its possession is a crime. Purpose means an intent to accomplish something, a resolve to do a particular act or to accomplish a certain thing.

As I have instructed you, under one set of circumstances a knife may constitute a dangerous knife and under another set of circumstances its possession may be lawful. Therefore, you must consider all of the surrounding circumstances and facts in evidence such as the size, shape and condition of the knife, including any alterations thereto; the nature of its concealment, if any; the time, place and actions of the defendant when found in his possession.

If, upon a consideration of the total circumstances you conclude that the purpose in carrying the knife was to use it as a weapon, it then would be a dangerous knife within the meaning of this statute.

Therefore, in order to warrant a conviction you must be satisfied beyond a reasonable doubt, from all the facts and surrounding circumstances, that the

defendant intentionally possessed the knife in question and secondly that the purpose of possession was its use as a weapon.

*(NOTE: Possession of a dangerous knife under N.J.S.A. 2A:151-41 is prohibited in any place, public or private. State v. Johnson, 125 N.J. Super. 344 (App.Div. 1973), rev. in part and modified in part, 65 N.J. 388 (1974).

State v. Green, 62 N.J. 547 (1973).

State v. Howard, 125 N.J. Super. 39 (1973).

State v. Ebron, 122 N.J. Super. 552 (App.Div. 1973), certif. denied 63 N.J. 250 (1973).

State v. Horton, 98 N.J. Super. 258 (App.Div. 1967), certif. denied 51 N.J. 393 (1968).

State v. Edwards, 120 N.J. Super. 46 (Law Div. 1972).

Approved: 5/20/75

2.252 POSSESSION OF LOTTERY SLIPS

The defendant has been charged with a violation of a provision of our statutes pertaining to lotteries. That statute (N.J.S.A. 2A:121-3) provides in part:

> Any person who:
>
> ***(b) Knowingly possesses any paper, document, slip or memorandum that pertains in any way to the business of lottery or lottery policy, so-called, whether the drawing has taken place or not *** is guilty of a ... [crime].

In order for you to find the defendant guilty, you must be satisfied that the State has proven, beyond a reasonable doubt, each of the following essential elements of the offense charged:

1. That the (paper) (document) (slip) (memorandum) marked as an exhibit pertained in some way to the business of lottery or lottery policy, so-called; and
2. That the defendant possessed, or had under (his) (her) control the (paper) (document) (slip) (memorandum); and
3. That the defendant intended to possess the (paper) (document) (slip) (memorandum); and

4. That the defendant knew that the (paper) (document) (slip) (memorandum) pertained to the business of lottery or lottery policy.

The term "lottery" means a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing. Slips pertaining to the numbers game are lottery slips within the meaning of the statute. (N.J.S.A. 2A:121-6). It is not necessary for the State, in order to sustain its burden, to prove an actual particular lottery.

(IF POSSESSION IS IN ISSUE, REFER TO MODEL JURY CHARGE ON POSSESSION (4.251) AND USE THOSE PORTIONS WHICH APPLY TO YOUR CASE)

Intent means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. For you to find possession on the part of the defendant you must first find intent, that is, that (he) (she) intended to exercise control over the (paper) (document) (slip) (memorandim) in evidence. In addition to intent, for you to find possession on the part of the defendant you must also find that the defendant had

knowledge of the character of that which he possessed. It is possible to possess something without knowing it but such possession is not possession within the meaning of the law.

Intent and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. It is not necessary that the State produce witnesses to testify that defendant said (he) (she) had a certain intent and knowledge when (he) (she) engaged in a particular act. Intent and knowledge may be proven and inferred from circumstantial evidence, including the nature of the exhibits in evidence, and by reference to defendant's conduct, words, or acts, and from all of the surrounding circumstances.

If you find that the State has failed to sustain its burden of proving each and every one of the elements of the offense as I have stated them to be beyond a reasonable doubt, then the defendant must be acquitted.

The defendant is guilty of the above offense whether (he) (she) was the person who took the money wagered on the outcome of a lottery, that is, a lottery operator or runner, or was the person responsible for

paying off the winners, if any. In addition, if you find that the papers in evidence do pertain to the business of lottery, the mere fact that one who knowingly possesses them is a bettor will not absolve him. The focus is on the character of the paper, document, slip, or memorandum and not upon the role of the possessor. In other words, in a lottery situation, the statute does not distinguish between takers of bets and bettors.

RECENT CASENOTES:

(1) "Possession of lottery slips" [N.J.S.A. 2A:121-3(b)] and "working for a lottery" [N.J.S.A. 2A:121-3(a)] are separate and distinct offenses. State v. Sims, 65 N.J. 359, 375 (1974); State v. Siebert, 126 N.J. Super. 534, 537 (App.Div. 1974).

(2) "[P]ossession of lottery slips is not dependent on proof that the person is knowingly engaged in clerical operations in furtherance of a lottery. Possession requires an intent to exercise control over an object and the effective realization of that attitude. This attitude may be realized if the person is in actual control of the material or has the present ability to exercise control to the exclusion of others. *** The existence of clerical duties, such as tabulating and/or collating wagers, is not an integral part of the offense of possession." State v. Siebert, supra, at 537-38.

DEFINITIONS:

"Possession" - State v. Reed, 34 N.J. 554, 557 (1961)
State v. Siebert, 126 N.J. Super. 534, 537 (App.Div. 1974)

"Lottery" - State v. Brown, 67 N.J. Super. 450, 454-55 (App.Div. 1961)

State v. Rucker, 46 N.J. Super. 162 (App.Div. 1957), certif. denied, 25 N.J. 102 (1957)

State v. Gattling, 95 N.J. Super. 103 (App.Div. 1967) certif. denied, 50 N.J. 91 (1967)

"Bettor" - State v. Purdy, 51 N.J. 303 (1968)

State v. Melamed, 93 N.J. Super. 573 (App.Div. 1967) aff'd 51 N.J. 303 (1968)

Approved: 9/1/76

2.253 POSSESSION WITH INTENT TO DISTRIBUTE OBSCENE MATERIAL N.J.S.A. 2A:115-2

The Indictment reads in pertinent part as follows:

[Read Indictment]

The pertinent part of the Statute on which this Count of the Indictment is based reads in effect as follows:

> N.J.S.A. 2A:115-2
>
> Any person who shall possess with intent to distribute any obscene book, publication, pamphlet, picture or other representation however made is guilty of a crime.

It is unlawful for any person to possess with intent to distribute, or offer for sale, any obscene or indecent book, publication, pamphlet, picture or other representation however made.

In order to find a defendant guilty of this offense, you must first find that the State has proven beyond a reasonable doubt that:

(1) The defendant was knowingly in actual or constructive possession of one or more of the films or magazines mentioned in the First Count of the Indictment.

(2) At the time that the defendant possessed it he had the intent to distribute it.

(3) That one or more of the items mentioned in the First Count of the Indictment is obscene as I will define it; and,

(4) That the defendant knew or should have known that the item was or the items were obscene.

In order to assist you in your findings, the Court will define the above referred to terms that go to make up the elements of the crime alleged in the First Count of the Indictment.

[As well as the other Counts of this Indictment]

INTENT

[Give standard definition of Intent]

POSSESSION

[Give definition of Possession, including actual, constructive, and where the facts indicate, joint]

KNOWINGLY

Possession requires knowledge; that is, knowledge by the defendant of the character of that which he possessed, whether the possession be actual, constructive or joint. It is possible to possess something without knowing it, but such possession is not possession within the meaning of this Statute.

As I indicated, the elements of the crime are that the defendant was knowingly in possession of the material; that at the time he possessed it he had an intent to distribute it; that it was obscene; and that the defendant knew or should have known it was obscene.

The defendant denies that he had knowledge of the contents of the films or magazines and further denies that he intended to distribute any of the items.

These are factual issues for you the jury to resolve.

What is obscene? The law defines obscene as follows: To be obscene, one or more of the items mentioned in Count 1 of the Indictment must be found by you to be(1) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or patently offensive representations or descriptions of masturbation or lewd exhibition of the genitals; and,

(2) That to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest in such matters; and,

(3) That the material taken as a whole lacks serious literary, artistic, political or scientific value. Contemporary community standards means the standards of the community in which we live and in which it is alleged the items in evidence were knowingly possessed with the intent to distribute them. It means the standards of New Jersey.

Contemporary means the standards as they exist at the present time rather than past standards.

The law speaks of the average person because the test is not whether it would appeal to the prurient interests of those

comprising a particular segment of the community such as the highly prudish, or a particular group who might be interested in some particular sexual deviation, or those persons who may be indifferent or unmoved about any kind of obscenity.

In other words, it is your job to determine the impact upon the average person in the community. When considering the evidence, would the average person in the community applying today's standards find that the dominant theme of the material, considered as a whole, appeals to the prurient interests, that is, that it has a tendency to provoke lustful thoughts and lascivious longings. Again, in judging the materials in evidence, you should not consider the effect of these exhibits upon particularly susceptible persons, such as homosexuals or people with a particular deviant interest, but rather as how they appear to the average person.

I further caution you that before an article is obscene, all the elements of the term must be proved beyond a reasonable doubt, that is,

(1) That the material depicts or describes in a patently offensive way, sexual conduct that I have just described, that is, representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or patently offensive representations or descriptions of masturbation or lewd exhibits of the genitals;

(2) That to the average person applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interests in such matters; and,

(3) That the material, taken as a whole, lacks serious literary, artistic, political or scientific value.

A defendant may be found guilty on a particular count if one of the films or periodicals mentioned in that count satisfies the elements of the crime as I have defined the elements for you.

SALE OR DISTRIBUTION COUNT

Count 2 of the Indictment reads in pertinent part as follows:

The pertinent part of the Statute on which this Count of the Indictment is based reads in effect as follows:

> Any person who shall sell or distribute any obscene book, publication, pamphlet, picture or other representation however made, is guilty of a crime.

Sale means the exchange of an article for a consideration, usually money.

To distribute means to deliver, that is, the actual transfer of a thing from one person to another. Keep in mind, however, that the First Count or charge in the Indictment does not charge actual distribution, but possession with intent to

distribute. The word distribute, as referred to in Count 2 of the Indictment, does not mean sale; no consideration need be proved by the State. By that I mean the State is not required to prove that the intent to distribute was for money. Of course, you may find there was a sale that would include distribution, according to the evidence as you find it to be.

In this Count the defendants are charged with the actual sale or distribution of obscene material as distinguished from the First Count which charges knowing possession with intent to distribute. These are separate crimes and separate verdicts are required with respect to each defendant and each charge. In order to find a defendant guilty of the offense charged in Count 2 of the Indictment, you must find that the State has proved beyond a reasonable doubt that:

(1) The item or items in evidence and mentioned in Count 2 are obscene;

(2) The defendant did knowingly sell or distribute films and/or magazines named in the Second Count to [Investigator John Smith on _____(date).]

(3) Defendant intended to sell or distribute the items to _____ knowing or being in the position where he should have known that what he sold or distributed was in fact obscene.

Again, the definitions of obscene material that I have given you with respect to the First Count can be utilized in evaluating the elements of the Second Count, along with the definitions of sale and distribution.

NOTE:

State v. DeSantis, 65 N.J. 462 (1974)

Miller v. California, 413 U.S. 15, 32, 37 L. Ed.2d 419, 435, 93 S.Ct. 2607 (1973)

State v. Hudson County News Company, 41 N.J. 247 (1963)

Approved: 6/24/75

2.270 RAPE

The indictment reads in pertinent part as follows:

READ INDICTMENT

The pertinent part of the statute on which this indictment is based reads as follows:

> "Any person who has carnal knowledge of a woman forcibly against her will or while she is under the influence of any narcotic drug ... is guilty of [a crime]... ." N.J.S.A. 2A:138-1.

(INTERPOLATE WORDING OF STATUTE AS REQUIRED BY FACTS OF CASE.)

"Carnal knowledge" means sexual intercourse between a male and a female. To convict the defendant of rape the jury must find that he had sexual intercourse with the female forcibly and against her will. To complete the crime of rape there must be penetration by the sexual organ of the male into the sexual organ of the female. The slightest penetration is sufficient.

The essential elements of the crime of rape are carnal knowledge by force by the male and non-consent thereto by the female. Consent, however

reluctant, negates rape. If a woman assaulted is physically and mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the assault. This resistance must be by acts and not by mere words, and must be reasonably proportionate to the victim's strength and opportunity. It must be in good faith and without pretense, with an active determination to prevent the violation of her person, and must not be merely passive and perfunctory. However, the fact that a victim finally submits does not necessarily imply that she consented. Force includes not only physical violence but also duress or the threat of physical violence. Submission to a compelling force, or as a result of being put in fear, is not consent. It is only required that the female resist as much as she possibly can under the circumstances, and the circumstances and conditions surrounding the parties at the time of the alleged offense are to be considered in determining whether adequate resistance was offered. The allegation of force is established by evidence showing that her resistance was overcome by physical force, or that her will was overcome by fear. In either case the allegation is complete, even if the

female ceases to offer resistance before the penetration of her body is finally consummated.

N.J.S.A. 2A:138-1

State v. McPherson, ____ N.J. Super. ____ (App.Div. 7/3/75)

State v. Riley, 49 N.J. Super. 570, 584, affirmed 28 N.J. 188 (1958).

State v. Orlando, 119 N.J.L. 175, 183 (Sup. Ct. 1937)

State v. Terry, 89 N.J. Super. 445, 449-450 (App.Div. 1965).

State v. Harris, 70 N.J. Super. 9, 16-17 (App.Div. 1961)

State v. Conner, 97 N.J.L. 423, 427 (Sup. Ct. 1922)

State v. Provet, 133 N.J. Super. 432 (App.Div. 1975)

See State v. Bono, 128 N.J. Super. 254, certif. denied, 65 N.J. 572 (1974).

[You are instructed that the use of a deadly weapon by the defendant either to injure or to threaten his victim may be considered by you as proof of both force and non-consent.*]

[Finally, you are reminded that a conviction for rape may be sustained on the uncorroborated testimony of the complainant as long as you are satisfied that the elements of the crime and the defendant's

participation in the crime have been established beyond a reasonable doubt.**]

NOTE: Bracketed material may be used where pertinent.

*McMillan v. State of New Jersey, 408 F. 2d 1375 (1969)

**State v. Garcia, 83 N.J. Super. 345 (App.Div. 1964)

Approved: 9/1/76

2.271 RECEIVING STOLEN PROPERTY

(BEFORE YOU GIVE THIS CHARGE TO A JURY REFER TO ALL NOTES WHICH MAY BE APPLICABLE TO YOUR CASE)

The indictment charges the defendant with receiving stolen property in violation of a statute or law of the State of New Jersey (N.J.S.A. 2A:139-1) which provides as follows:

> "Any person who receives or buys any goods or chattels, or choses in action, or other thing of value stolen from any other person or taken from him by robbery or otherwise unlawfully or fraudulently obtained, or converted contrary to law, whether the stealing or robbery was committed either in or out of this state, and whether the property was received or bought from the thief or robber, or from another person...is guilty of a [crime]... "
>
> (If there is a dispute over the value of the property, that question should be submitted to the jury.)

The mere receiving of stolen property is not in and of itself a crime in New Jersey by virtue of this statute, but receiving of stolen property knowing that it has been stolen is a crime, and the statute must be considered as if the word "knowingly" were contained therein.

In order to meet its burden of proof, the State must prove each of the following three elements beyond a reasonable doubt:

1. That the property in question was stolen.

2. That the defendant either received or bought the stolen property.

3. That at the time the defendant received or bought the stolen property, he knew it had been stolen.

As to the first element, property is considered stolen if illegally taken from another person without his permission and with the intent wrongfully to deprive the owner of his property permanently. If you determine that the property in question was stolen, the identity of the thief is immaterial.

As to the second element requiring the State to prove that the defendant received the stolen property, the identity of the person from whom the defendant may have obtained the stolen property is immaterial, but the State must prove that the defendant was in possession of the property (NOTE: HERE USE MODEL CHARGE ON POSSESSION, INCLUDING CONSTRUCTIVE OR JOINT POSSESSION, IF APPLICABLE).

The third element requires that the State prove that when the defendant received the stolen property, he knew it to have been stolen. Now, how are you to determine whether the defendant had such knowledge? The State does not have to prove that the defendant was told that the property was stolen nor that he said that he knew it to have been stolen. Knowledge is a state of mind, and it may be proved by circumstantial evidence--that is, by all the surrounding circumstances including the defendant's actions and statements. (If the evidence explains how the defendant came into possession of the property you may desire to charge as follows: Knowledge may be found by you to have existed if you determine that the defendant received the property under such circumstances that a man of ordinary caution and intelligence would believe it to have been stolen. Mere suspicion that the property had been stolen would not be enough, but suspicious circumstances may be part of the whole picture from which you may determine knowledge on the part of the defendant that the property had been stolen.)

(NOTE: Use the next two paragraphs when the proofs indicate possession within one year of the theft,

or in automobile cases in accordance with State v. Bott, 53 N.J. 391 (1969).)

Under our law, you may infer guilty knowledge on the part of a person who has possession of stolen property within a reasonably short time from the theft itself.

Although possession of stolen property within a limited time from the theft is not in and of itself a crime, since it is possible under our law to possess such goods and remain innocent, such possession within a reasonably short time after the theft may be found sufficient by you to establish guilty knowledge unless the evidence shows to your satisfaction that the property was acquired by the defendant under his belief that his acquisition of the property was legal.

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

However, you are never required to make this inference. It is the exclusive province of the jury to

determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of his constitutional rights the accused need not take the witness stand and testify.

Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused. Thus, if you find that the State has proved possession of the property, and that the property had been recently stolen, you may find the defendant guilty in the absence of a satisfactory explanation from the evidence as to the circumstances surrounding

the possession of the property. You will recall that I have already charged you as to what constitutes possession within the law.

As I have previously mentioned, possession by a person of stolen property within a reasonably short time after it was stolen raises a permissible inference of guilty knowledge. However, this is a permissible inference only, and not a mandatory inference. That is, you may accept or reject such inference after considering all the other evidence in the case. If you accept the inference, you should weigh it in connection with all the other evidence, keeping in mind that the burden of proof is upon the State to prove guilt beyond a reasonable doubt. The permissible inference to which I have referred does not shift that burden of proof.

(NOTES for this charge on following pages)

NOTES:

Do not charge the jury as to the five specific categories in N.J.S.A. 2A:139-1 which authorizes an acquittal despite a showing of a knowing possession of the stolen property within one year from the date of the theft. In State v. DiRienzo, 53 N.J. 360 (1969), the court said: "...nothing is gained by reading them to the jury. ...[W]e believe that any reference...ought to be omitted." 53 N.J. at 382.

The jury must be informed that guilty knowledge is essential even though the statute does not so state. A literal reading of the statute would indicate that a conviction is permitted without regard to such proof, which, of course, would make the statute vulnerable to constitutional attack. Receiving stolen goods is traditionally a crime which requires proof of defendant's state of mind as an element of the State's case and this includes both intentional possession and guilty knowledge, i.e., knowledge that the goods were stolen and an intent to deprive the rightful owners of their possession. State v. DiRienzo, supra; State v. Laster, 69 N.J. Super. 504 (App.Div. 1961); State v. Hudson County News Co., 35 N.J. 284 (1961).

Intentional control and dominion over the stolen goods is required, and this is to be distinguished from guilty knowledge. State v. Labato, 7 N.J. 137, 148-49 (1951). Intentional control and dominion means merely that the defendant was aware of his possession: "one who has the physical control of a chattel with the intent to exercise such control either on his own behalf or on behalf of another is in possession of the chattel." Restatement Second, Torts Section 216, Comment b.

The statutory inference that unexplained possession of stolen property within one year is sufficient to authorize a conviction does not curtail the trial judge's traditional power, and if he finds, in analyzing the evidence before him, that the inference of guilty knowledge is so weak in the factual context of the particular case that the case should not be submitted to the jury, he may grant a dismissal motion. State v. DiRienzo, supra.

In charging the inference of guilt from possession of the stolen goods, it must be made clear that the inference is permissive in nature and not conclusive, that possession of stolen goods within a limited time from their theft is not, in and of itself, a crime, that it is possible for a man to possess such goods and be innocent, that the inference must be considered along with all the other evidence in the case in determining whether the possession was unlawful, and that the inference in no way shifts the burden of proof from the State to the defendant. State v. DiRienzo, supra.

The language used by the court in charging the above inference must make it clear that the defendant is under no compulsion to come forward personally and explain his possession so that there is no violation of defendant's protection against compulsory self-incrimination. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964), or the prohibition against adverse comment by judge and prosecutor on a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (1965).

Defendant is not limited to the five statutory defenses but may assert any other defense he desires which shows he received the property innocently. State v. Laster, supra; State v. DiRienzo, supra.

It is unnecessary that State establish guilt as to all of the goods or chattels set forth in the indictment as long as guilt as to some of them are so established. State v. Bozeyowski, 77 N.J. Super. 49 (App.Div. 1962).

For further discussion of possession and constructive possession see: Restatement Second, Torts Section 216, Comment b; State v. DiRienzo, supra; State v. Labato, supra; State v. Thomas, 105 N.J. Super. 331 (App.Div. 1969); particularly dissenting opinion, State v. Reed, 34 N.J. 554 (1961); State v. Bozeyowski, supra.

Mere suspicion by defendant that the goods were stolen is not sufficient; the State must establish actual knowledge. State v. Goldman, 65 N.J.L. 394 (S.Ct. 1901), and defendant must have had such knowledge

at the time he received the same rather than having obtained such knowledge at a subsequent time. State v. Werner, 1 N.J. Misc. 180 (Sup. Ct. 1924). However, suspicious circumstances may be part of the circumstances from which knowledge that the goods were stolen may be inferred. State v. Vitale, 35 N.J. Super. 568 (App. Div. 1955).

Where motor vehicle is the alleged stolen property the indictment must allege violation of N.J.S.A. 2A:139-3 and not N.J.S.A. 2A:139-1. State v. Bott, 53 N.J. 391 (1969). In such a case defendant cannot be convicted on mere proof that he was a passenger in the stolen vehicle. State v. Serrano, 53 N.J. 356 (1969); State v. Kimbrough, 109 N.J. Super. 57 (App. Div. 1970). A passenger in a stolen automobile can be convicted of receiving stolen property under N.J.S.A. 2A:139-3 under proper proofs. Possession need not be exclusive possession. "One has possession as soon as he intentionally obtains a measure of control or dominion over the custody of the stolen property even though physical possession is in another." State v. Kimbrough, supra. However, possession of the motor vehicle within a reasonable time after its theft furnishes a rational basis for a permissible, but not mandatory, inference that the acquisition of the vehicle was accompanied by knowledge of the theft. State v. Bott, supra. Where a motor vehicle is stolen in another state and brought into New Jersey an indictment under N.J.S.A. 2A:119-9 should be charged rather than N.J.S.A. 2A:139-3, because their violations create separate offenses with differing elements. N.J.S.A. 2A:139-3 proscribes receiving a stolen motor vehicle in New Jersey. Whereas, N.J.S.A. 2A:119-9 seeks to prevent bringing stolen motor vehicles into New Jersey. State v. Holder, 137 N.J. Super. 300 (App. Div. 1975).

See also: State v. D'Adame, 84 N.J.L. 386 (E.&A. 1913) and State v. Giordano, 121 N.J.L. 469 (Sup. Ct. 1939).

See also: Barnes v. U.S., 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed. 2d 830 (1973).

An inference that a possessor of stolen goods had knowledge that the goods were stolen usually comports with common experience if the goods are possessed shortly after the theft. Morisette v. U.S., 342 U.S. 246 (1952); State v. DiRienzo, supra; State v. Cannaro, 53 N.J. 388 (1969).

One cannot be guilty of both larceny and receiving stolen goods as the offenses are mutually exclusive. State v. Shelbrick, 33 N.J. Super. 7 (App. Div. 1954); State v. Bell, 105 N.J. Super. 238 (App. Div. 1969). If indictment is drawn in the alternative, jury should be instructed that defendant cannot be guilty of both but only of one. State v. Fioravanti, 46 N.J. 109 (1965), cert. denied, 384 U.S. 919, 86 S.Ct. 1365, 16 L.Ed. 2d 440 (1966).

Approved: 2/26/75

2.272 DEMAND OF MONEY OR PERSONAL GOODS BY MENACES, FORCE OR VIOLENCE (ROBBERY)

The defendant was indicted for violating the provisions of our State Statute 2A:90-3, the pertinent part of which reads as follows:

> "Any person who by menaces, force or violence demands of another any money or personal goods and chattels with intent to rob such other person is guilty"...[of a crime.]

The following definitions will aid you in arriving at an understanding of this statute:

(1) "menaces" means threats, words, gestures, or both, showing a disposition or determination by the defendant to inflict evil. To menace is to act in a threatening manner.

(2) "force or violence"--these words are synonymous and include any application of force even though it entails no pain or bodily harm and leaves no mark.

(3) "demands" means a command or order, expressed or implied.

(4) "personal goods" and "chattels" are personal property.

(5) "with intent to rob" means voluntarily or intentional.

Where, as here, an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

The intent of the defendant must be to rob, that is, to forcibly take from the person or custody of another by force or intimidation, money or personal goods and chattels with intent to permanently deprive the owner of same.

Therefore, in order to convict the defendant, the State has the burden of proving beyond a reasonable doubt each of the following elements:

(1) That the defendant used menaces, force or violence;

(2) That the defendant made a demand;

(3) That this demand was for money or personal goods and chattels from the person of another;

(4) That the above occurred concurrently with the intent to rob.

NOTES:

1. For cases dealing with the term "menaces", see generally 27 Words and Phrases, Menace (1961); State v. Brunswick, 91 N.E. 2d 553, 559 (Ohio Ct. of App. 1949); State v. Cruitt, 200 Kan. 372, 436 P. 2d 870, 874 (1968).

2. For definition of "force or violence", see Falconiero v. Maryland Cas. Co., 59 N.J. Super. 105 (Cty. Ct. 1960).

3. As to necessity of showing intent, see State v. Jackson, 90 N.J. Super. 306 (App.Div. 1966).

Approved: 1/29/75

2.273 ROBBERY

The defendant is charged in the Indictment with robbery in violation of N.J.S.A. 2A:141-1, which states:

> "Any person who forcibly takes from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, is guilty of a [crime] ... ."

To find the defendant guilty, the State must prove each of the following elements beyond a reasonable doubt:

1. a forcible taking from the person of another of money, or personal goods or chattels;
2. the forcible taking must be accomplished by violence or by putting the victim in fear; and
3. an intent to rob.

The phrase "from the person of another" has been broadly construed to include the taking of personalty of any value whatsoever from the custody of, or from the constructive possession of, or which is subject to the protection of, another. Thus, the taking of the

can be from either the person or presence of another. The crime involves no specific reference to the element of ownership. It is enough that the cash or personalty belongs to someone other than the thief.[1]

It is an essential element of the offense that the taking of the property be accomplished by force or violence or by putting the victim in fear. Although force implies personal violence, the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property. The taking of the property by means of intimidation or putting the victim in fear would satisfy the definition of this element. There is no exact standard by which to determine when an unlawful taking has been accompanied by putting in fear. It is enough that so much force, or threatening by word or gesture, be used as might create an apprehension of danger, or induce a person to part with his property without or against his consent.[2]

The intent to rob is a necessary element of the offense. The intent to rob is basically a larcenous intent, that is an intent to steal.[3] Stealing is the unlawful taking away of personalty of another with the intent to permanently deprive the owner of it. For

liability to attach, the intent to rob must exist concurrent with the act and must be proved.

Intent is a condition of mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolve to do a particular act or accomplish a certain thing.

However, it is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

It is the burden of the State to prove all of the elements of robbery beyond a reasonable doubt. Should you find that the State has failed to prove any one or more of the essential elements of the crime of robbery beyond a reasonable doubt, you must return a verdict of not guilty.

[1] State v. Bowden, 62 N.J. Super. 339, 345 (App. Div. 1960), certif. denied, 33 N.J. 385 (1960)

State v. Butler, 27 N.J. 560, 589 (1958)

State v. Ford, 92 N.J. Super. 356, 363 (App. Div. 1966)

State v. Cottone, 52 N.J. Super. 316, 323 (App. Div. 1958), certif. denied, 28 N.J. 527 (1959)

[2] State v. Woodworth, 121 N.J.L. 78, 85 (Sup. Ct. 1938)

State v. McDonald, 89 N.J.L. 421, 422 (Sup. Ct. 1916) aff'd. 91 N.J.L. 233 (E. & A. 1918)

State v. Culver, 109 N.J. Super. 108, 111 (App. Div. 1970), certif. denied, 56 N.J. 473 (1970)

[3] State v. Mayberry, 52 N.J. 413, 431 (1968), certif. denied, 393 U.S. 1043, 89 S. Ct. 673, 21 L. Ed. 593 (1969)

Approved: 9/1/76

2.280 SODOMY WITH ANIMALS (BUGGERY)

The defendant has been indicted for the crime of sodomy with an animal. The statute making this act a crime is N.J.S.A. 2A:143-1, the pertinent provisions of which read as follows:

> "Sodomy, or the infamous crime against nature, committed with man or beast, is a ... [crime]".

Now, what is sodomy with an animal? Such sodomy is defined as the penetration by the penis in any manner into the body of an animal.

Accordingly, the elements of this offense each of which must be proven beyond a reasonable doubt in order for you to return a verdict of guilty are:

(1) Penetration by the penis of the defendant.

(2) Penetration of the body of an animal.

With respect to this crime you are advised as to the following:

(1) Penetration need not be of any particular distance, the least penetration being sufficient.

(2) Ejaculation, that is the emission of semen, is not required.

Accordingly, if you find that the state has proven beyond a reasonable doubt that this defendant _____ caused his penis to penetrate the body of an animal, then the defendant is guilty of this indictment.

NOTE:

(1) Although the statute dealing with this crime refers to sodomy with an animal, Justice Francis, then Judge Francis, states that the correct term is "Buggery". State v. Morrison, 25 N.J. Super. 534 (Co. Ct. 1953).

(2) Reading of the sodomy indictment which contains rather archaic and dramatic common law English is not inflamatory or prejudicial. State v. Taylor, 46 N.J. 316 (1966).

(3) Sodomy is "the infamous crime against nature" so that the sense of the statute is "Sodomy, which is the infamous crime against nature ... ."

(4) "Acts of sex with animals or beasts sometimes called 'bestiality' or 'buggery' are generally included within the offense of Sodomy". Annotation, Sodomy, 70 Am.Jur. 2d, § 11 at 813.

(5) See also, State v. Griffin, 175 N.C. 767, 94 S.E. 678, 689 (1917). The New Jersey Criminal Law Revision Commission has concluded that N.J.S.A. 2A:143-1 "(a)s interpreted by our courts ... includes anal intercourse and bestiality ..." The New Jersey Penal Code, Volume II: Commentary, § 2C:14-2, p. 196. However, the proposed Penal Code does not include any provision as to private sexual contacts with animals. Id. at 197.

(6) While it might be argued that this statute should have equal application to both men and women New Jersey apparently affords unequal treatment to forms of male homosexual activity and lesbianism. This is clear from Justice Francis' restriction of sodomy with humans to a sexual act involving penetration by the penis.

Approved: 9/1/76

2.281 SODOMY WITH HUMANS

The defendant has been indicted for the crime of sodomy. The statute making this act a crime is N.J.S.A. 2A:143-1, the pertinent provisions of which read as follows:

> "Sodomy, or the infamous crime against nature, committed with man or beast, is a ... [crime]".

Now, what is sodomy? Sodomy is defined as the penetration by the penis into the anus of another person be that person man or woman, adult or child.

Accordingly, the elements of this offense each of which must be proven beyond a reasonable doubt in order for you to return a verdict of guilty are:

(1) Penetration of the anus of (name of victim).

(2) Penetration by the penis of the defendant.

With respect to this crime you are advised as to the following:

(1) Penetration need not be of any particular distance, the least penetration being sufficient.

(2) Ejaculation, that is the emission of semen, is not required.

(3) Consent of either party to the act is immaterial.

Accordingly, if you find that the state has proven beyond a reasonable doubt that this defendant _____ caused his penis to penetrate the anus of _____ then the defendant is guilty of this indictment.

NOTE:

(1) The acts of either fellatio or cunnilingus do not constitute sodomy. State v. Morrison, 25 N.J. Super. 534 (Co. Ct. 1953).

(2) Do not refer to "Buggery", such being copulation between a human and an animal. State v. Morrison, supra.

(3) Reading of the sodomy indictment which contains rather archaic and dramatic common law English is not inflamatory or prejudicial. State v. Taylor, 46 N.J. 316 (1966).

(4) Consent is immaterial and the statute prohibits heterosexual as well as homosexual acts. State v. Lair, 62 N.J. 388 (1973).

(5) The sodomy statute does not prohibit such an act between a married couple but does not violate the doctrine of equal protection in permitting conviction of consenting unmarried persons. State v. Lair, supra.

(6) Remoteness of time of examination of victim's rectum goes to weight of testimony rather than its admissibility. State v. Pitman, 98 N.J.L. 626 (Sup. Ct. 1923), aff'd, 99 N.J.L. 527 (E.&A. 1924).

(7) "Assault with Intent to Commit Sodomy" requires a greater degree of proximity to completion of offense than "Attempt to Commit Sodomy" and the two offenses do not constitute only one crime. State v. Still, 112 N.J. Super. 368 (App. Div. 1970).

(8) Sodomy with children under 16 is the subject of a separate statute, N.J.S.A. 2A:143-2, which provides for greater punishment.

(9) The least penetration is sufficient. Schlosser, 2 Criminal Laws of New Jersey, 3d, § 95:4.

(10) Sodomy is "the infamous crime against nature" so that the sense of the statute is "Sodomy, which is the infamous crime against nature ...".

Approved: 6/26/74

2.290 THREAT TO KILL BY SPEECH
N.J.S.A. 2A:113-8(b)

The indictment is based upon a Statute, N.J.S.A. 2A:113-8(b), which in pertinent part, provides: "Any person who, in public or private, by speech...threatens to take or procure the taking of the life of any person... is guilty of *** [a violation of the law]."

A threat to kill has been defined as a declaration of an intent or determination to kill. In this case the defendant is alleged to have said, "....."

(HERE INSERT WORDING ALLEGED TO HAVE BEEN USED BY DEFENDANT.)

Your first consideration should be as to whether or not the evidence satisfies you beyond a reasonable doubt that the defendant in fact used the words attributed to him or the equivalent thereof. If you are not so satisfied, then you need deliberate no further. You should declare the defendant not guilty.

However, if you find that the defendant spoke these words, or their equivalent, then you must determine secondly whether or not, in the context of the conversation and under the circumstances in which said remarks

were made, such remarks did constitute a threat to take or procure the taking of the life of _____. The words used must be of such a nature as to convey menace or fear to the ordinary hearer. It is not necessary for the State to prove that the defendant actually intended to carry out the threat then or at some future time, nor that _____actually felt menaced or fear.

It is to be noted that idle talk or joking will not constitute the crime. Words said in jest, or words which represent an expression of desire, or words which constitute mere idle talk or exaggeration or words that state a political opposition to the person said to have been threatened no matter how crude, offensive, or vituperative, are not true threats. To warrant a conviction the words used under the circimstances presented must be found by you to have the clear capacity to convey to the ordinary person a sense of menace or fear. Unless this element has been proven beyond a reasonable doubt the defendant must be acquitted.

The third element of this offense is intent, not the intent to carry out the threat, but rather the intent to convey menace or fear to the hearer.

(HERE GIVE THE BASIC CHARGE ON "INTENT")

To summarize, if you find beyond a reasonable doubt (1) that the words, or their equivalent, were spoken by the defendant to the complaining witness; and (2) that these words are of such a nature as to convey menace or fear to the ordinary hearer under the circumstances present as those circumstances are found to have existed by you from the evidence; and (3) that the defendant intended by speaking the words to convey menace or fear to the hearer, you shall convict the defendant. On the other hand, if you find that the State has failed to prove all or any one of the elements of the offense beyond a reasonable doubt, you shall acquit him.

State v. Kaufman, 118 N.J. Super. 472 (App. Div. 1972), certif. den., 60 N.J. 467 (1972)

State v. Schultheis, 113 N.J. Super. 11 (App. Div. 1971), certif. den., 58 N.J. 390 (1971)

State v. Green, 116 N.J. Super. 515 (App. Div. 1971), modified, 62 N.J. 547 (1973)

State v. Montague, 101 N.J. Super. 483 (App. Div. 1968), modified, 55 N.J. 387 (1970)

2.300 UTTERING OF A CHECK

The indictment reads in pertinent part as follows:

(Read indictment.)

The pertinent part of the statute on which this indictment is based reads as follows:

> N.J.S.A. 2A:109-1.
>
> "Any person who, with intent to prejudice, injure, damage or defraud any other person:
>
> "b. Utters or publishes as true any such false, altered, forged or counterfeited matter, knowing the same to be false, altered, forged or counterfeited is guilty of a violation of the law."

As used in the statute, the word "utter" means to put or send into circulation. The word "publish" as used in the statute means the same thing, to put forth. To utter and publish is to declare or assert, directly or indirectly, by words or actions that an instrument is good with an intention or offer to pass it.

The essential elements of the offense of uttering a forged check, each of which the State must prove beyond a reasonable doubt are:

(1) That the check in question was falsely made or altered; and

(2) That the defendant passed or attempted to pass the check; and

(3) That the defendant knew the check to be falsely made or altered; and

(4) That the defendant passed or attempted to pass the check with specific intent to defraud; and*

(5) That the falsely made or altered check was apparently capable of effecting a fraud.

*[DEFINE INTENT WHERE NECESSARY]

State v. Sabo, 86 N.J. Super. 508 (App. Div. 1965)

State v. Berko, 75 N.J. Super. 283 (App. Div. 1962)

State v. Redstrake, 39 N.J.L. 365 (1877)

Approved: 5/20/75

2.400 WORKING FOR LOTTERY

The defendant has been charged with a violation of a provision of our statutes pertaining to lotteries. That statute (N.J.S.A. 2A:121-3) provides in part:

> Any person who:
>
> (a) Knowingly engages as a messenger, clerk or copyist, or in any other capacity in or about an office or room in any building or place where lottery slips or copies of numbers or lists of drawings of a lottery, drawn or to be drawn *** are printed, kept or used in connection with the business of lottery or lottery policy, so-called *** is guilty of a [crime].

In order for you to find the defendant guilty, you must be satisfied that the State has proven, beyond a reasonable doubt, each of the following essential elements of the offense charged:

1. That the defendant intended to and did engage as a messenger, clerk or copyist, or in any other capacity for a lottery or lottery policy operation or business.
2. That the defendant knew that the business in which (he) (she) was involved, employed or engaged was a lottery or lottery policy operation or business.

3. That the office, room or place* where defendant was so knowingly involved, employed or engaged was in fact used in connection with a lottery or lottery policy operation or business.

The term "lottery" means a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing.

It is not necessary for the State, in order to sustain its burden, to prove the existence of an actual, particular lottery.

In order for the defendant to be convicted, you must be satisfied that the State has proven beyond a reasonable doubt that the defendant knew that the operation in which (he) (she) was involved, employed or engaged was the business of lottery or lottery policy and that defendant knew the nature of the business for which (he) (she) worked. In addition, the defendant must be shown to have known that the office, room, or place in or about which (he) (she) worked was used for the business of lottery or lottery policy.

Intent and knowledge are conditions of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means

a purpose to do something, a resolution to do a particular act or accomplish a certain thing. It is not necessary that the State produce witnesses to testify that defendant said (he) (she) had a certain intent and knowledge when (he) (she) engaged in a particular act. Intent and knowledge may be proven and inferred from circumstantial evidence, including the nature of the exhibits in evidence, and by reference to defendant's conduct, words or acts, and from all of the surrounding circumstances.

If you find that the State has failed to sustain its burden of proving each and every one of the elements of the offense as I have stated them to be beyond a reasonable doubt, then the defendant must be acquitted.

The activity which constitutes the offense under this statute is one where a person knowingly engages as a messenger, clerk or copyist, or acts or performs any other activity in any other capacity in connection with a lottery or lottery policy operation or business. That is, the statute prohibits any activity or involvement which is in furtherance of any aspect of a lottery operation such as the writing of numbers, the pick-up and delivery of numbers, the sorting

of slips with numbers, the keeping or making of records of numbers, assisting in the maintenance or operation of a lottery office or bank, the preparation of ribbon tallies on an adding machine, the counting or keeping of money in connection with a lottery, the receiving of calls for the placement of wagers or bets on horses, races, or numbers, or the receiving and recording of the results of a lottery.

FOOTNOTE:

> The word "place" in the statutory language is a general term and encompasses those factual situations in which the lottery business is conducted outside of an "*** office or room in any building ***." N.J.S.A. 2A:121-3. This term "*** should be construed broadly in the light of the criminal activity [the lottery statute] was designed to control and in accordance with the clear and long-standing comprehensive policy against unauthorized gambling." State v. Soto, 119 N.J. Super. 186, 188 (App. Div. 1972); see also State v. Puryear, 52 N.J. 81 (1968).

DEFINITION:

"Lottery" - State v. Rucker, 46 N.J. Super. 162 (App. Div. 1957) certif. denied, 1957

State v. Brown, 67 N.J. Super. 450, 454-55 (App. Div. 1961)

State v. Gattling, 95 N.J. Super. 103 (App. Div. 1967) certif. denied 50 N.J. 91 (1967)

See also: State v. Snow, 149 N.J. Super. 276 (App. Div. 1977).

3.100 ALIBI

The defendant as a part of his denial of guilt contends that he was not present at the time and place that the crime was alleged to have been committed, but was somewhere else and therefore could not possibly have committed or participated in the crime. Where the presence of the defendant at the scene of the crime is essential to show its commission by him, the burden of proving that presence beyond a reasonable doubt is upon the State. The defendant has neither the burden nor the duty to show that he was elsewhere at the time and so could not have committed the offense. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that of the defendant's presence at the scene of the crime and his participation in it.

If, after a consideration of all of the evidence, including the evidence of the defendant's whereabouts at the time of the offense, you have a reasonable doubt as to the presence of the defendant at the time and place of the crime, or as to whether he committed or participated in it, you must acquit the defendant. If, however, after considering all of the evidence, you are convinced beyond a reasonable doubt of the defendant's presence at the scene of the crime and have concluded that the State has proved each and every element of the offense charged in the indictment beyond a reasonable doubt, it is your duty to return a verdict of guilty as charged.

State v. Garvin, 44 N.J. 268, 272 et seq. (1965).

State v. Ravenell, 43 N.J. 171, 187 (1964).

State v. Driver, 38 N.J. 255, 290 (1962).

State v. Mucci, 25 N.J. 423, 431 (1957).

Note:

Use of the pejorative word "alibi" has been avoided. See State v. Peetros, 45 N.J. 540, 553 (1965).

If the facts warrant it, defendant is entitled to the charge even in the absence of a request. State v. Searles, 82 N.J. Super. 210 (App. Div. 1964).

Approved: 6/26/74

3.130 DRUNKENNESS

(To be used when the State seeks a conviction for first degree murder.)

There has been testimony in this case that indicates the consumption of alcoholic beverages (the use of drugs) by the defendant prior to the time he is alleged to have committed the offense charged. This testimony was received in evidence as bearing on the question of whether or not the defendant in fact performed the mental operations necessary to raise a murder from second degree to first degree.

In considering this question you must discriminate between the condition of mind merely excited by intoxicating drink (or drugs) and yet capable of premeditating and deliberating, and the condition in which these mental faculties are overcome thereby rendering a person incapable of committing first degree murder.

If you find that at the time he is alleged to have committed the offense charged, the defendant had in fact consumed alcoholic beverages (used drugs) and that as a result of that consumption (use) he was incapable of performing the mental operations that are required for first degree murder, then the defendant could not be found

guilty of first degree murder. But the influence of liquor (drugs), no matter how pervasive that influence may be, is not a defense to the crime of murder in the second degree, and therefore, has no bearing on the guilt or innocence of the defendant for that crime.

See:

State v. Maik, 60 N.J. 203, 215 (1972)

> "*** the voluntary use of liquor or drugs has been held to be relevant in determining whether the defendant in fact performed the mental operations necessary to raise a murder from second degree to first degree. But the influence of liquor or drugs thus voluntarily taken, no matter how pervasive that influence may be, will not lead to an acquittal. It cannot reduce the crime below murder in the second degree, and this because of the demands of public security. *** This is equally true as to a felony homicide. Thus a defendant who in fact participated in the felony in which the homicide occurred, can seek nothing more favorable than a conviction of murder in the second degree by proof that he could not, on that account, form the intent to commit the felony."

Note: Stated as a general proposition, voluntary intoxication is not a defense to criminal conduct. The Supreme Court in State v. Maik, Supra, at p. 214, noted:

> "*** a defendant will not be relieved of criminal responsibility because he was under the influence of intoxicants or drugs voluntarily taken. This principle rests upon public policy, demanding that he who seeks the influence of liquor or narcotics should not be insulated from criminal liability because that influence impaired his judgment or his control. The required element of badness can be found in the intentional use of the stimulant or depressant. Moreover, to say that one who offended while under such influence was sick would suggest that his sickness disappeared when he sobered up and hence he should be released. Such a concept would hardly protect others from the prospect of repeated injury."

If there is testimony indicating the consumption of alcoholic beverages or use of drugs, the court should charge the following:

> "Intoxication is no defense to the charge in this case. The jury is not to consider the evidence as to the use of intoxicating beverages (drugs) on the issue of the defendant's guilt or innocence."

Exception: If the voluntary use of liquor or drugs results in a state of insanity, although temporary, there is authority for the proposition that intoxication will be a defense to the commission of the crime. See State v. Maik, 60 N.J. 203, 215 (1972).

> "*** if the use of liquor or drugs though voluntary, results in a fixed state of insanity after the immediate

influence of the intoxicant or drug has spent itself, insanity so caused will be a defense if it otherwise satisfied the M'Naghten test."

Revised 1/24/79

3.131 VOLUNTARY INTOXICATION

(To be used in all but the following four situations: 1) murder cases;[1] 2) when drugs taken from medication produce unexpected results; 3) felony homicides where intoxication precludes formation of underlying felonious intent; and 4) where use of intoxicant results in fixed state of insanity after intoxicant's influence has expended itself).[2]

There has been testimony that indicates the voluntary consumption of alcoholic beverages (the use of drugs) by the defendant prior to the time he is alleged to have committed the offense charged. This in no way should be construed as relieving the defendant of criminal responsibility for the crime charged.

This principle rests upon the sound public policy which holds all men accountable for acts voluntarily undertaken.

In this case, if you find that the alcohol was voluntarily taken, and the acts charged were actually committed by the defendant, you may infer that the defendant acted intentionally in committing those acts with which he is charged.

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1 For murder cases, reference should be made to State v. Maik, 60 N.J. 203 (1972). It should be remembered that under certain circumstances voluntary drunkenness or the use of drugs can serve to reduce first degree murder to second degree murder under proper circumstances. See State v. Maik, supra.

2 See State v. Stasio, ____ N.J. ____ (Decided January 18, 1979); State v. Atkins, ____ N.J. ____ (Decided January 18, 1979), where the Supreme Court held that voluntary intoxication is not a defense to crime except in the four exceptional circumstances above.

Approved: 3/7/77

3.133 DURESS

The defendant asserts that at the time and place set forth in the indictment he acted under duress, that is, as a result of force or threats of force directed toward him, and therefore he is not guilty of the crime charged.

(At this point review factually the evidence concerning duress.)

Before conduct, which would otherwise be criminal, can be excused on the grounds that such conduct was as a direct result force or threats of force upon the defendant, the evidence must indicate that the following conditions existed at the time:

1) the use of, or threatened use of, unlawful physical force or violence upon the defendant, and,

2) the force, or threatened force, would create in the mind of a reasonable person, fear for his life or serious bodily injury, and

3) a reasonable person, confronted with the same situation, would not have been able to resist the force or threats of force without suffering serious bodily harm or loss of life.

The fear must be of death or great bodily harm, and the danger must not be one of future violence, but one of present and immediate violence at the time the acts of the defendant were committed.

The danger of death at some future time will not excuse the defendant from criminal responsibility for his acts.

A person who aids or assists in the commission of a crime, or who commits a crime, is not excused from criminality on account of fears resulting from threats or menaces, unless the danger be to life or serious bodily harm and unless that danger be a present and

immediate danger.

This defense is not available if the defendant had a reasonable and safe opportunity to avoid the threatened harm; nor is it available if the defendant in any way contributed to the creation of the situation which brought about the threats and menaces by another against his person.

If the defendant had a reasonable opportunity to avoid doing the criminal acts charged without unduly exposing himself to death or serious bodily harm, then he may not invoke this defense to excuse otherwise criminal conduct.

I further instruct you that duress cannot be raised as a defense if the apprehended harm is that of harm to property only.

The State has the burden of proving, beyond a reasonable doubt, that the defense of duress is untrue, and if you have a reasonable doubt as to whether the defendant acted under duress, as I have defined that defense, you must acquit the defendant. (1)

NOTE: (1) State v. Chiarello, 69 N.J. Super. 479 (App. Div. 1961), cert. den. 36 N.J. 301 (1962)

Citations:

State v. Dissicini, 126 N.J.Super. 565 (App. Div. 1974)
Defense of duress held not available to the charge of murder since one is not permitted to submit to force to take the life of an innocent person but is required to risk or sacrifice his own life instead.

People v. Harmon, 220 N.W. 2d 212 (1974)

People v. Richards, 75 Cal. Rptr. 597 (1969)

Wharton's Criminal Law, Coercion and Duress, Sec. 123.

3.141 ENTRAPMENT

The defendant contends that he was entrapped, that is, he says he does not necessarily deny that there was a violation of the criminal laws but the methods employed by law enforcement officials, and/or their (agent or informant) were unconscionable and contrary to public policy.[1]

The law does not prohibit the use of artifice and strategem (trickery) to catch those engaged in criminal enterprise, but the law does not authorize a law enforcement officer, either by himself or through an informant, or in concert with others, to entrap another person by intentionally instilling in that person's mind an intent to commit a criminal offense when that person has no notion, predisposition or intent to do so and is not engaged in an unlawful business which the officer is trying to detect.

If a person has a notion, pre-disposition or intent to commit an offense or is engaged in unlawful business which the police officer is trying to detect, the fact that the officer and/or his informant furnishes that person an opportunity to commit the criminal offense or aids him in the commission of the crime in order to secure the evidence necessary to prosecute, does not constitute entrapment.

Entrapment exists when the criminal idea or design originates with the law enforcement official, and/or his informant and they, or one of them, implant in the mind of an innocent person the disposition to commit the offense and induce its commission in order to prosecute.

The basic search is for the origin of the intent to commit the crime. Did it originate with the officer and/or his informant and was the offense the product of the creative activity of either one or both of them?

Generally it may be said that where law enforcement officials and/or their informants envisage a crime, plan it, and activate its commission by one not theretofore intending its perpetration, for the purpose of providing a victim for prosecution, the defense is available.

Entrapment is an affirmative defense. This means that the defendant has the burden of adducing evidence in its support. However, once such evidence appears, either in the State's case or that of the defendant, the burden is upon the State to prove beyond a reasonable doubt that the defense of entrapment is untrue.

(Where the State introduces evidence of predisposition of the defendant to commit the crime, the following is suggested:)

Thus the State may then introduce evidence to demonstrate, if believed, that the defendant was not an innocent person who would not have committed the offense were it not for the proposal and inducement of the law enforcement officers and/or their informant. Thus, for this purpose the court has permitted to be introduced for your consideration evidence of (previous conviction of crime), (reputation for criminal activities) (ready compliance with minimal inducement) or, (easily yielding to the opportunity to commit the offense). Whether such evidence along with the other facts and surrounding circumstances establishes a predisposition on the part

of the defendant to commit the crime in question and therefore overcoming the defense of entrapment is for you to determine.

(Where allegations are made that the physical materials necessary to commit the crime were supplied by law enforcement officers or their agent or informant, the following is suggested:)

However, even though the defendant may appear predisposed to commit the crime, should you find as a fact that an informer or other agent acting in concert with the law enforcement authority, has furnished the defendant with heroin for the purpose of arranging a sale of the heroin by the defendant to an undercover officer, which sale is then consummated, and notwithstanding that the furnishings of the heroin is unknown to and contrary to the instructions of the law enforcement authorities, the defendant is entitled to a verdict of not guilty. (This charge may also be adapted to situations where the defense alleges that burglar tools, counterfeit dies or other materials necessary to the commission of the crime in question were in fact furnished by the law enforcement officials and agent or informant.

The issue of entrapment is left to you for your determination. The defense of entrapment is a complete defense and the defendant is entitled to a verdict of not guilty unless the State has satisfied you beyond a reasonable doubt that the defendant committed the crime charged as a result of his own pre-disposition and that he was not entrapped into doing so by the police official or his informant.

United States v. Russell, 411 U.S. 423 (1973)

Sherman v. United States, 356 U.S. 369 (1958)

Sorrells v. United States, 287 U.S. 435 (1935)

State v. Talbot, 71 N.J. 160 (1976)

State v. Dolce, 41 N.J. 422, 430-435 (1964)

State v. White, 86 N.J. Super 410 (App. Div. 1965)

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1 In a case where defendant asserts not only entrapment as a defense, but also contends that he did not commit the crime as charged, he is entitled to a charge to the effect that he is not admitting the crime charged merely because he asserts the defense of entrapment. See State v. Branam, 161 N.J. Super. 53 (App. Div. 1978), where the Appellate Division held that a defendant need not incrimirate himself as a condition to invoke an entrapment defense. Petition to the Supreme Court for certification pending.

Apart from his general denial of guilt the defendant maintains that he is not guilty of the crime charged by reason of insanity.

If you find that the State has failed to prove beyond a reasonable doubt any essential element of the offense, or the defendant's participation in the offense, you must find the defendant not guilty and you need not consider the evidence as to the defendant's insanity.

If you find that the State has proved beyond a reasonable doubt each essential element of the offense, and the defendant's participation in the offense, you must then consider the evidence as to the defendant's insanity.

All persons, with certain exceptions not pertinent to this case, are presumed capable of committing crime. Among the persons incapable of committing crime are insane persons, therefore it is necessary for me to instruct you with respect to the law of insanity so far as it relates to the responsibility of a person for the commission of a crime.

First of all, the law entertains no prejudice against the defense of insanity. On the contrary, if the defense of insanity be sufficiently established, the law allows the defendant the benefit of it by an acquittal of all criminal responsibility. To consider this defense it is necessary that you understand the law's concept of criminal responsibility. Our society and our law recognize that some people may be bad and some people may be sick. A hostile act,

that is, an illegal act, may in one case spring from wickedness and in another from some infirmity or sickness of the mind which the individual did not design. It is society's moral judgment, recognized by our law, that a forbidden act should not be punished criminally unless done with a knowledge of wrongdoing.

The law, however, from considerations of public policy, the welfare of society and the safety of human life, proceeds with the greatest of care, requiring the proof of such a defense of insanity be established consistent with a standard recognized by the law. Under our law all persons are assumed to be sane, and therefore, responsible for their conduct until the contrary is established. Insanity is an affirmative defense and the burden of proving it by a preponderance of the evidence is on the defendant who asserts the defense. If there is no preponderance of evidence of insanity, the defense of insanity fails; and the defendant stands in the position of a sane man responsible on all the evidence in the case for his acts, whatever you may find them to have been.

The law adopts a standard of its own as a test of criminal responsibility, a standard not always in harmony with the views of psychiatrists. Many of the forms and degrees of mental disease which in the judgment of medical man would be regarded as insanity are rejected by the law in the administration of criminal justice.

If at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong, he was legally insane.

As you can see, the law regards insanity as a disease of the mind. It may be temporary or permanent in its nature but the condition must be a mental disease.*

An accused may have the most absurd and irrational notions on some subject; he may be unsound in mind, and be a fit subject for confinement and treatment in a hospital for the insane; but, if on an accusation like this, he had, at the time of the deed, the mental capacity to distinguish right from wrong and to understand the nature and quality of the act done by him, he is amenable to the criminal law. These principles must necessarily be the governing principles in the administration of the criminal law, or the most heinous crimes would be those which would not be punishable, for such crimes are almost always committed under the influence of an impulse which overcomes and sets at naught the restraint which usually prevents the commission of a crime.

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* A model paragraph for IRRESISTIBLE IMPULSE, TEMPORARY INSANITY, ET AL is placed after the recitation of possible VERDICTS, INSANITY page 9 *infra*.

Therefore, to establish insanity as a defense to the criminal charge in this case the defendant must prove, by a preponderance of the evidence, that he was laboring under such a defect of reason from a disease of the mind as not to know the nature and quality of the act, or if he did know it, that he did not know what he was doing was wrong. Your verdict in this determination, like all other criminal verdicts, must be unanimous. All twelve must agree. Any other verdict would be illegal.[1]

The term "fair preponderance of the evidence" means the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to your minds.

Keep in mind, however, that although the burden rests upon the defendant to establish the defense of insanity by a preponderance of the credible evidence, the burden of proving the defendant guilty of [murder, or any degree thereof] beyond a reasonable doubt is always on the State, and that burden never shifts.

The question is not whether the accused, when he engaged in the deed in fact actually thought or considered whether the act was right or wrong, but whether he had sufficient mind and understanding to have enabled him to comprehend that it was wrong if he had used his faculties for that purpose.

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1 State v. Gadson, 148 N.J. Super. 457 (App. Div. 1977)

To determine whether the defendant has established by the preponderance of the evidence that, at the time of the commission of the alleged offense, he was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong, you should consider all of the relevant and material evidence having a bearing on his mental condition, including his conduct at the time of the alleged act, his conduct since, any mental history, any lay and medical testimony which you have heard from the witnesses who have testified for the defense and for the State, and such other evidence by the testimony of witnesses or exhibits in this case, that may have a bearing upon, and assist you in, your determination of the issue of his mental condition.

There is a conflict of medical testimony, and you will have to determine where the truth lies. As is true with all issues of fact, the issue is for you to resolve after a careful consideration, comparison and evaluation of all the evidence which is material to, or relevant on, the issue of the defendant's sanity. The assumed sanity of the defendant is not overcome until you determine that the defendant has sustained his burden of proving by a preponderance of the evidence that, at the time of the offense alleged, he was insane under the legal definition of insanity and, therefore, is absolved

of responsibility for conduct for which he would otherwise be responsible under our law. The jury is the sole judge of the weight to be given to lay and psychiatric testimony. Generally speaking, no distinction is made between expert testimony and evidence of another character. The same tests that are applied in evaluating lay testimony must be used in judging the weight and sufficiency of expert testimony. You are the sole judges of the credibility of the medical witnesses, as well as all other witnesses, and the weight to be accorded to their testimony. You saw and you heard them. You had the opportunity to observe their attitude and demeanor on the witness stand. You had the opportunity to hear their means of obtaining knowledge of the facts, and to notice their power of discernment, their candor or evasion, if any, and their general and special professional and expert qualifications and background. These factors, the possible bias in favor of the side for whom he testifies, and any other matters which serve to illuminate his statements, may all be considered by you in determining the credibility of this expert testimony and the weight to be accorded to it or any part of it.

The medical experts have testified that statements were made to them by the defendant which statements were part of the history they secured from the defendant. As I have previously instructed you, these statements should not be considered as substantive evidence against the defendant relating to his guilt or innocence of the alleged offense,

but only as evidence tending to support the ultimate expert conclusion of the psychiatrist receiving the history on the test of insanity. The witness, in effect, is not saying that such history is true. He is merely testifying that the statements comprising the history were made to him. You may, in fact, determine from the evidence in the case that the facts set forth in such history are true, or are not true, and, in the light of such findings, decide what effect such determination has upon the weight to be given to the opinion of the expert which was based thereon.

However, if a medical expert has testified that his opinion hinges upon the truth of the matter asserted by the defendant at the time the defendant gave the history to the doctor, rather than simply that it was said, the jury is instructed that the probative value of the psychiatrist's opinion will depend upon whether there is, from all of the evidence in the case, a finding that those facts are true. If the doctor has testified that he accepts as true certain facts on which he bases his opinion, the jury should understand that, to some extent, your acceptance or rejection of the doctor's opinion will be based on your findings as to the truth of these facts.

V E R D I C T S

You may return 1 of 3 possible verdicts:

(1) Guilty; or,

(2) Not Guilty; or,

(3) Not Guilty by reason of insanity.

If you find that the State has proved beyond a reasonable doubt all the essential elements of the offense and that the defendant has not established the defense of insanity by a fair preponderance of the credible evidence, then you must find the defendant guilty of the offense.

If you find that the State has failed to prove beyond a reasonable doubt all or any one of the essential elements of the offense, or the defendant's participation in the offense, you must find the defendant not guilty.

If you find that the State has proved all the elements of the crime and the defendant's participation therein beyond a reasonable doubt and if you also find that the defendant has established the defense of insanity by a fair preponderance of the credible evidence, your verdict must be "not guilty by reason of insanity" and you shall so report and declare your verdict.[2]

A verdict of not guilty by reason of insanity does not necessarily mean that the defendant will be freed or be indefinitely committed to a mental institution. Under our law, if you find the defendant not guilty by reason of insanity it will be for the court to conduct a hearing and among other matters determine whether or not

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2 Prior to State v. Krol, 68 N.J. 236 (August, 1975), the jury was required under this statute to determine whether defendant's insanity continued. Krol however declared certain portions of the statute unconstitutional and placed this determination exclusively with the court. In accord with N.J.S. 2A:163-3.

the defendant's insanity continues to the present. Dependent on the determinations made by the Court, the defendant's fate may range from commitment to a mental institution and treatment therein through a regimen of supervised or unsupervised treatment to unconditional release.[3]

V E R D I C T S

Again, you may return 1 of 3 verdicts:

(1) Not Guilty by reason of insanity; or,

(2) Not Guilty; or,

(3) Guilty.

*IRRESISTIBLE IMPULSE, TEMPORARY INSANITY, ET AL - The following may be considered if Irresistible Impulse, Temporary Insanity, etc., have been raised as defendes.

New Jersey rejects the doctrine of emotional insanity that begins on the eve of the criminal act and ends when the act is consummated. It also rejects the doctrine of emotional insanity based upon ungovernable passion; or of moral insanity, based upon a perverted or defective moral sense;[4] as well as the doctrine of irresistible impulse, where the defendant is said to be afflicted with a state of mind which irresistibly impels him to the commission of a deed, while it leaves him with sufficient capacity to know the nature and

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3 As per State v. Krol, 68 N.J. 236 (1975).

4 State v. Cordesco, 2 N.J. 189 (1949); State v. Aschbach, 107 N.J.L. 433 (1930); Genz v. State, 58 N.J.L. 482 (1895).

the quality of the act which he does and that it is wrong, but notwithstanding, he is unable to refrain from doing it;[5] for example, kleptomania, an irresistible impulse to steal; or pyromania, an irresistible impulse to set fires, or homicidal mania, an irresistible impulse to kill. In order for the defendant to sustain his burden of proof as to incompetancy, he must show a mental disease which had some degree of continuity beyond manifesting itself in a single or isolated criminal act.[6]

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5 State v. Cordesco, supra; State v. George, 108 N.J.L. 508 (1932); State v. Noel, 102 N.J.L. 659 (1926); State v. Carrigan, 93 N.J.L. 268 (1919); State v. Genz, 59 N.J.L. 488 (1894); Mackin v. State, 59 N.J.L. 495 (1896); State v. Lucas, 30 N.J. 37, 72 (1959).

6 State v. Lucas, supra.

CITATIONS

State v. Lynch, 130 N.J.L. 253 (E.&A. 1943)

State v. Cordasco, 2 N.J. 189 (1949)

State v. Lucas, 30 N.J. 37 (1959)

State v. Vigliano, 43 N.J. 44 (1964)

State v. Sikora, 44 N.J. 453 (1965)

State v. Maik, 60 N.J. 203 (1972), rev'd. in part in
State v. Krol, 68 N.J. 236 (1975)

State v. Bell, 102 N.J. Super. 70 (App. Div. 1968), certif den.
52 N.J. 485, cert. den., 394 U.S. 911 (1969)

State v. DiPaglia, 64 N.J. 288 (1974)

State v. Carter, 64 N.J. 382 (1974)

State v. Krol, 68 N.J. 236 (1975)

N.J.S. 2A:163-3

State v. Gadson, 148 N.J. Super. 457 (App. Div. 1977)

3.220 MISADVENTURE

The defendant as part of his denial of guilt contends that the killing alleged to have been committed was a misadventure, that is, accidental and unintentional.

A section of our statutes relative to homicide, N. J. S. 2A:113-6, provides in its pertinent parts as follows:

> "Any person who kills another by misadventure *** is guiltless and shall be totally acquitted and discharged."

Homicide by misadventure, which is excusable, is the accidental killing of another, where the slayer is doing a lawful act, unaccompanied by any criminally careless or reckless conduct.

To find that this homicide was excusable by reason of misadventure you must find the existence of all of the following facts or elements:

(1) The act resulting in death must be a lawful one.

(2) It must be done with such reasonable care and due regard for the lives and persons of others so as not to constitute criminal negligence.

(3) The killing must be accidental and not intentional, or without evil design or intention on the part of the slayer.

If you find that any one of these facts or elements do not exist the homicide was not by misadventure. If you find all of them do exist then the homicide was by misadventure and the defendant must be acquitted.

The defendant has neither the burden nor the duty to show that the homicide was by misadventure. The State has the

burden of proving beyond a reasonable doubt that the killing was not by misadventure---i.e., that at least one of the facts or elements I listed do not exist.

I will now discuss in detail each of the three elements which make a homicide one by misadventure.

The first element which you must find to find misadventure is that the act resulting in the homicide must be lawful.

Even though the homicide is unintentional, it is not excusable where it is the result or incident of an unlawful act, such as pointing or presenting a gun, pistol or other firearm at another person in such a manner as to constitute an offense under the laws of this State, (a description of the appropriate law should be given at this point), or unlawfully striking another with an intent to hurt although not with an intent to kill.

The second element which you must find to find misadventure is that the act resulting in death was done without criminal negligence---that is, that the act was one that is not reckless and wanton or of such character as shows an utter disregard for the safety of others under circumstances likely to produce death[1].

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1. State v. Watson, 77 N. J. L. 299, 301 (1909) (Failure to provide medical attendance to child)
State v. Pickles, 46 N. J. 542, 555 (1966) (Child neglect, utter indifference to the life of her son)
State v. Weiner, 41 N. J. 21, 26, 43-4 (1963) (Medical Malpractice)
State v. Harrison, 107 N. J. L. 213, 215 (1930) (Railroad crossing guard - negligence evincing a reckless indifference to or disregard of human life)

The third element which you must find to find misadventure is simply that the killing must be accidental and not intentional, or without evil design or intention on the part of the slayer.

If you believe from the evidence in this case that the defendant was engaged in a lawful act without any intention of killing anyone, but unfortunately, by misadventure, and while acting with such reasonable care and due regard for the lives and persons of others as I've defined it for you, killed _____, the deceased, at the time and place charged in the indictment, the killing would be excusable homicide or misadventure and your verdict should be "NOT GUILTY".

No burden of proof or duty to show misadventure is cast upon the defendant. The burden of proof is upon the State to prove its case beyond a reasonable doubt. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that the killing was <u>not</u> the result of misadventure.

If, after a consideration of all of the evidence, including the evidence as to the issue of misadventure, you have a reasonable doubt as to the guilt of defendant because of the existence of misadventure or as to any element of any offense covered by the indictment which I've described, you must acquit the defendant.

On the other hand, if you are persuaded beyond a reasonable doubt that the killing was not the result of misadventure, then you shall consider the remaining issues of the case and

determine, on the basis of my instructions to you, what verdict should be returned with respect to the various offenses covered by the indictment that I've described. If you find that the State has proved each and every element of a specific offense beyond a reasonable doubt, you should return a verdict of guilty of that offense. If as to any such offense you find the State has not proved any one element of that offense beyond a reasonable doubt, you should, of course, acquit defendant of that offense.*

NOTE: Presently there are only two cases in New Jersey which even obliquely refer to the defense of "misadventure". State v. Scott, 104 N. J. L. 544 (E. & A. 1928); State v. Reyes, 50 N. J. 454, 458 (1967). The above charge represents the holdings of the vast majority of our sister states. More particularly, the charge is based on the following: 1 Wharton, Criminal Law, §212, pp. 463-4; Pavillard v. Commonwealth of Pa., 421 Pa. 571, 220 A. 2d 807 (Pa. 1966); 2 Hemphill Ill. Jury Instr., §3939, p. 221. See the recent case of State v. Burt, 107 N. J. Super. 390 (App. Div. 1970), which involves misadventure.

*This last paragraph assumes the short form murder indictment. If the indictment is solely for manslaughter, it should be modified.

3.280 SELF-DEFENSE

Defined

You are instructed that self-defense is the right of a person to defend himself (and those subject to his custody and control) against any unlawful force or seriously threatened unlawful force, actually pending or reasonably apprehended.[1]

This right arises only when one acts under a reasonable belief that he is in imminent danger of bodily harm, and the privilege is limited to the utilization of that amount of force which the defender reasonably believes necessary to overcome the risk of harm.[2]

Therefore, if the force used, in a claim of self-defense, was unnecessary in its intensity, such claim may fall.[3]

A person may kill in self-defense when the act of killing is necessary or reasonably appears to be necessary in order to preserve his own life or to protect himself from serious bodily harm. Whether the act of killing was necessary or reasonably appeared to be necessary is to be determined by you.[4] The ultimate question for your consideration is whether the defendant acted as a reasonable man under the circumstances at the time of the homicide.[5]

Retreat

The issue of retreat arises only if the defendant resorted to a deadly force. Deadly force means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. It is not the nature of the

force defended against which raises the issue of retreat, but rather the nature of the force which the accused employed in his defense. If he does not resort to a deadly force, one who is assailed may hold his ground whether the attack upon him be of a deadly or some lesser character.[6]

Specifically, one who is attacked may hold his ground and resist the attack, but he may not resort to the use of deadly force, that is, force which he knows will create a substantial risk of causing death or serious bodily harm, if an opportunity to retreat with complete safety is at hand and he is consciously aware of this fact.[7] In your inquiry as to whether a defendant who resorted to deadly force knew that an opportunity to retreat with complete safety was at hand, the total circumstances including the attendant excitement must be considered.[8]

Limitations on the Duty to Retreat

No duty to retreat is imposed upon a person who, free from fault in bringing on a difficulty, is attacked at or in his dwelling house.

One who is assaulted in his dwelling house (and this would include a porch or other similar appurtenance) need not retreat but can stand his ground and use reasonable force to repel the assault, even though this may result in the death of the assailant. Before applying this principle you will examine all of the evidence in the case to determine from the evidence, whether the defendant was attacked

in his home (or on a porch or other similar appurtenance thereof), and if he was, whether he used reasonable force to repel the attack, that is, such force as he believed necessary to protect himself (and members of his family or household therein) in the circumstances as they reasonably appeared to him.[9]

However, if the assailant is not an intruder but is himself entitled to be on the premises, the obligation to retreat still exists.[10]

If you believe from the evidence before you that the defendant was in his dwelling house (or on a porch or other similar appurtenance thereto), that the decedent approached and drew (a weapon) and threatened to kill the defendant or appeared to want to seriously harm the defendant, and that the defendant reasonably believed he was in danger of losing his life or suffering serious bodily harm, the defendant was under no duty to retreat but might stand his ground and resist the attack even to the extent of employing deadly force.[11]

Burden of Proof - On Issues of self-defense and retreat

The burden is upon the State to prove beyond a reasonable doubt that the defense of self-defense is untrue, and hence there must be an acquittal if there is a reasonable doubt as to whether the defendant did act in self-defense within the definition of that defense.[12]

In regard to the issue of retreat, if the State does prove beyond a reasonable doubt that a defendant who resorted to deadly force knew that he could have retreated with complete safety, then, in that situation, the use of deadly force is not justifiable.

The burden is upon the State to prove beyond a reasonable doubt that the defendant knew he could have retreated with complete safety, and if a reasonable doubt regarding this question should exist, then the issue of retreat must be resolved in favor of the defendant.[13]

Defense of Another

The issue of whether a party may rightfully intervene in defense of a third person is determined by the subjective intent of the intervener, subject only to the qualification that the jury objectively find that he reasonably arrived at the conclusion that the apparent victim was in peril, and that the force he used was necessary. In applying this test in order to determine whether the defendant rightfully intervened in the defense of a third person you are instructed that you are to disregard any finding that the person in whose behalf the defendant intervened was in fact the aggressor or that no defensive measures on his behalf were actually necessary.[14]

Self-Defense Not Applicable

You are instructed that the defendant cannot avail himself of a self-defense claim if you find beyond a reasonable doubt that the necessity for such defense was of the defendant's own creation.[15]

1. State v. Brown, 46 N.J. 96 (1965).
2. State v. Fair, 45 N.J. 77, 91 (1965).
3. State v. Abbott, 36 N.J. 63, 68 (1961).
4. State v. Hipplewith, 33 N.J. 300, 316 (1960).
5. State v. Bess, 53 N.J. 10, 16 (1968).
6. State v. Abbott, supra. at p. 71.
7. State v. Abbott, supra. at pp.71-72;
   State v. Bonano, 59 N.J. 515, 518 (1971)
8. State v. Abbott, supra. at p. 72.
9. State v. Goldberg, 12 N.J. Super. 293, 307 (App.Div. 1951);
   State v. Bonano, supra. at p. 519;
   1 Wharton, Criminal Law and Procedure (Anderson ed. 1957) Sec.239.
10. State v. Pontery, 19 N.J. 457, 475 (1955);
    State v. Abbott, supra. at pp. 67-68.
11. State v. Bonano, supra. at p. 521.
12. State v. Abbott, supra. at pp.72-73.
13. State v. Abbott, supra. at p. 73.
14. State v. Fair, supra. at pp. 92-93.
15. State v. Agnesi, 92 N.J.L. 53, 56-57 (Sup.Ct. 1918), affirmed 92 N.J.L. 638 (E. & A. 1918).

NOTE:

Care should be taken to select only those of the above instructions that are pertinent to the case. The charge should be anchored to the factual setting. See, State v. Abbott, 36 N.J. 63, 74-75 (1961).

Approved: 9/1/76

4.100 ACCOMPLICE TESTIMONY

_____, one of the defendants, has admitted his guilt and has testified on behalf of the State.

(Applies to co-defendant)

OR

_____, a witness herein, has testified to facts which may show some involvement on his part in the criminal situation out of which the indictment and trial of the defendant arose.

(Applies to witness other than co-defendant)

The law requires that the testimony of such a witness be given careful scrutiny. In weighing his testimony, therefore, you may consider whether he has a special interest in the outcome of the case and whether his testimony was influenced by the hope or expectation of any favorable treatment or reward, or by any feelings of revenge or reprisal.

If you believe this witness to be credible and worthy of belief, you have a right to convict the defendant on his testimony alone, provided, of course, that upon a consideration of the whole case, you are satisfied beyond a reasonable doubt of the defendant's guilt.

State v. Spruill, 16 N.J. 73, 78 et seq. (1954)

State v. Begyn, 34 N.J. 35, 54 et seq. (1961)

Note (1): Use of the word accomplice should be avoided.

State v. Gardner, 51 N.J. 444, 461 (1968)

State v. Anderson, 104 N.J. Super. 19 (App. Div. 1968)

(2) The charge should not be given except upon the request of defense counsel.

> "While a defendant is entitled to such a charge if requested and a judge may give it on his own motion if he thinks it advisable under the circumstances, it is generally not wise to do so absent a request, because of the possible prejudice to the defendant. State v. Begyn, 34 N.J. 35, 54-56 (1961); State v. Gardner, 51 N.J. 444, 460-461 (1968). Certainly it is not error, let alone plain error, for a trial judge to fail to give this cautionary comment where it has not been requested."

State v. Artis, 57 N.J. 24, 33 (1970)

See also: State v. Gardner, 51 N.J. 444, 460-461 (1968)

State v. Anderson, 104 N.J. Super. 18 (App. Div. 1968), aff'd, 53 N.J. 65 (1968), cert. denied, 394 U.S. 966 (1969)

Approved: 9/1/76

4.101 AIDING OR ABETTING[1]

(ACTING IN CONCERT)

Caveat: Do not confuse the concept of Aiding or Abetting with Conspiracy.

The State contends that the defendants were aiding or abetting each other in the commission of the crime charged.

A section of our criminal law, N.J.S.A. 2A:85-14, provides in its pertinent part as follows:

> "Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal."

This provision means that not only is the person who actually commits the criminal act responsible for it, but those who are aiding or abetting are also responsible.

The word "aid" as contained in the statute means to assist, support or supplement the efforts of another, and the word "abet" means to encourage, counsel, incite or instigate the commission of a crime. If you find that the defendant (defendants) willfully and knowingly aided or abetted another (others) in the commission of the offense, you must consider them principals. Aiding or abetting does not have to be proved

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(1) This charge may be used even though the defendant is named as a principal in the indictment. State v. Fiorello, 36 N.J. 80 (1961).

by direct evidence of a formal plan to commit a crime, verbally agreed to by all that are charged. The proof may be circumstantial. Participation and agreement can be established from conduct as well as spoken words. However, one cannot be held as an aider or abettor unless you find as a fact that he shared the same intent required to be proved against the person who actually committed the act.

[DEFINE INTENT]

Note: Presence at the Scene

Mere presence at or near the scene of a crime does not make one a participant in the crime, nor does the failure of a spectator to interfere make him a participant in the crime. It is, however, a circumstance to be considered with the other evidence in determining whether he was present as an aider or abettor, but presence is not in itself conclusive evidence of the fact. Whether presence has any probative value depends upon the total circumstances. To constitute guilt there must exist a community of purpose and actual participation -- an aiding or abetting -- in the crime committed.

While mere presence at the scene of the perpetration of a crime does not render a person a participant in it, proof that one is present at the scene of the commission of the crime

without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is possible for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding or abetting the same. It depends upon the totality of the circumstances as those circumstances appear from the evidence.

Note:

In a murder case the charge on aiding or abetting must take into account the fact that while each participant may be guilty as a principal under the statute, he is not necessarily guilty in the same degree. If two or more parties enter into the commission of a crime with the same intent and purpose, each is guilty to the same degree; but each may participate in the criminal act with a different intent. Thus, each defendant may be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind. State v. Fair, 45 N.J. 77, 95 (1965).

State v. Madden, 61 N.J. 377 (1972)

State v. Mayberry, 52 N.J. 413 (1968)

State v. Sullivan, 43 N.J. 209, 236 (1964)

State v. Smith, 32 N.J. 501, 521 (1960)

State v. Ellrich, 10 N.J. 146 (1952)

State v. Fox, 70 N.J.L. 353 (Sup. Ct. 1904)

State v. Sims, 140 N.J. Super. 164 (App. Div. 1976)

Approved: 2/26/75

4.102 ATTEMPT

OPENING COMMENT:

ALTERNATIVE (1)

(At this point, the jury should be instructed as to the definition of the specific crime charged in the indictment.)

In this case, the State charges the defendant attempted to commit the crime of _____.

ALTERNATIVE (2)

(If the facts in the trial of a crime specifically charged raise an issue as to whether the crime was completed, the jury should be instructed to "turn to a consideration of whether an attempt to commit the crime has been established". An attempt is a lesser included offense. See State v. O'Leary, 31 N.J. Super. 411, 417 (App.Div. 1954), cf. State v. Mathis, 47 N.J. 455, 463 (1966).

In this case the State charges that the defendant committed the crime of _____. If you are not satisfied that the commission of the crime of _____ has been made out beyond a reasonable doubt then you should consider whether an attempt to commit the crime has been established.

An attempt to commit a crime is an overt act done with intent to commit the crime but falling short of its actual commission. In other words, there cannot be a conviction for attempt unless the following three elements exist:[1]

1. An intent to commit the crime.
2. Performance of some overt act towards the commission of the crime, and
3. Failure to consummate or complete the commission of the crime.

The first element is the intent to commit the crime itself. Intent is a condition of the mind which, of course, cannot be seen but can only be determined by inference from conduct, words or acts. Intent means a purpose to do something, a resolve to do a particular act or to accomplish a certain end or result. It is not necessary that witnesses be produced to testify that an accused said he had a certain intent when he engaged in the act. Intention may be gathered from acts and conduct. That is, you may find that the defendant intended to commit the crime on the basis of all that was said and done at the particular time and place, and from all the surrounding circumstances.

The second element of the crime is the performance of some overt act towards the commission of the crime. Something more than mere preparation is essential. The act or acts must be such as would normally result in the usual and natural course of events in the commission of the crime itself had it not been for the intervention of outside causes.

The third element is the failure to consummate the commission of the intended crime. In other words, the accomplishment of the intended criminal purpose must have been thwarted because of some outside reason.

It is no defense that a person could not have succeeded in reaching his intended criminal goal because of circumstances unknown to him.[2] However, there cannot be a conviction for an attempt to commit a crime unless the attempt, if completed, would have constituted a crime.[3]

NOTE:

At present, there appears to be no New Jersey cases dealing directly with the defense of abandonment and the crime of attempt. The following language in California cases may be helpful if abandonment is raised:

> "There can be no doubt that mere intent by a single individual to commit a crime is not sufficient to amount to a criminal act. However, it is also unquestionable that after the intent has been coupled with an overt act toward the commission of the contemplated offense, the abandonment of the criminal purpose will not constitute a defense to a charge of attempting to commit a crime."

People v. Robinson, 180 Cal. App. 2d 745, 4 Cal. Rptr. 679, 682 (1960).

See also: People v. Staples, 6 Cal. App. 3d 61, 85 Cal. Rptr. 589, 594 (1970).

As to when abandonment is a defense, see the following:

> "Abandonment of intent is only a defense if the attempt to commit the crime is freely and voluntarily abandoned before the act is put in the process of final execution."

People v. Claborn, 224 Cal. App. 2d 38, 36 Cal. Rptr. 132, 134 (1964).

FOOTNOTES: [1]State v. Swan, 131 N.J.L. 67, 69 (E.&A. 1943)

[2]State v. Moretti, 52 N.J. 182, 188-191 (1968), cert. denied 393 U.S. 952, 89 S.Ct. 376 (1968)

[3]State v. Weleck, 10 N.J. 355, 372 (1952)

OTHER CASES:

State v. Weleck, 10 N.J. 355, 373 (1952)

State v. O'Leary, 31 N.J. Super. 411, 417 (App.Div. 1954)

State v. Schwarzbach, 84 N.J.L. 268 (E.&A. 1913)

State v. Mathis, 47 N.J. 455 (1966)

State v. Meisch, 86 N.J. Super. 279, 281 (App. Div. 1965), certif. denied 44 N.J. 583 (1965)

State v. Blechman, 135 N.J.L. 99, 102 (Sup. Ct. 1946)

Approved: 2/1/77

4.120 TESTIMONY OF CHARACTER WITNESS

Evidence of good character or reputation of an accused is always competent in the trial of a criminal action, and is entitled to be considered by you.

You, the jury, should consider all of the relevant testimony, including that relating to the defendant's good character or reputation, and if, on such consideration, there exists a reasonable doubt of his guilt, even though that doubt may arise merely from his previous good repute, he is entitled to an acquittal; but if, from the entire evidence in this case, including that relating to good character, you believe the defendant guilty beyond a reasonable doubt, he should be convicted and the evidence of good character should not alter the verdict.

State v. Randall, 95 N.J.L. 452, 455 (E.& A.1921)
State v. Siciliano, 21 N.J. 249, 262 (1956)
State v. Reyes, 50 N.J. 454, 466 (1967).

Approved: 2/26/75

4.121 CIRCUMSTANTIAL EVIDENCE

You, as jurors, should find your facts from the evidence adduced during the trial. Evidence may be either direct or circumstantial. Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. On the other hand, circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Indeed, in many cases, circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence.

However, circumstantial evidence should be scrutinized and evaluated carefully. A conviction may be based on circumstantial evidence alone or in

combination with direct evidence, provided, of course, that it convinces you of a defendant's guilt beyond a reasonable doubt.

NOTES:

1. Insert the following if facts of the particular case warrant, and if an affirmative defense which can be proved by circumstantial evidence has been raised by the defendant:

> "Conversely, a defendant may be found not guilty by circumstantial evidence if the evidence raises in your mind a reasonable doubt as to the defendant's guilt."

2. In some cases, giving a simple illustration of circumstantial and direct evidence may be helpful in clarifying the different concepts for the jury. The following is one set of possible illustrations:

The problem is proving that it snowed during the night:

a) Direct Evidence: Testimony indicating that the witness observed snow falling during the night.

b) Circumstantial Evidence: Testimony indicating that there was no snow on the ground before the witness went to sleep, and that when he arose in the morning, it was not snowing, but the ground was snow-covered.

The former directly goes to prove the fact that the snow fell during the night; while the latter establishes facts from which the inference that it snowed during the night can be drawn.

3. For cases dealing with circumstantial evidence, see: State v. Corby, 28 N.J. 106 (1958); State v. Fiorello, 36 N.J. 80 (1961); State v. Ray, 43 N.J. 19, 30-31 (1964); State v. Mills, 51 N.J. 277, 287 (1968); State v. Franklin, 52 N.J. 386, 406 (1968); State v. Mayberry, 52 N.J. 413, 436-437 (1968); State v. Graziani, 60 N.J. Super. 1, 13-14 (App.Div. 1959), aff'd 31 N.J. 538 (1960), cert. denied 363 U.S. 830 (1960); State v. Hubbs, 70 N.J. Super. 322, 328-329 (App.Div. 1961); State v. Papitsas, 80 N.J. Super. 420, 424 (App.Div. 1963).

4.130 DEFENDANT'S ELECTION NOT TO TESTIFY

(To be employed only when requested by defendant)

The defendant in this case chose not to be a witness. It is the constitutional right of a defendant to remain silent.

I charge you that you are not to consider for any purpose or in any manner in arriving at your verdict, the fact that the defendant did not testify nor should that fact enter into your deliberations or discussions in any manner or at any time.

The defendant is entitled to have the jury consider all of the evidence and he is entitled to the presumption of innocence even if he does not testify as a witness.

Malloy v. Hogan, 378 U.S. 1 (1964).

Griffin v. California, 380 U.S. 609 (1965).

State v. McLaughlin, 93 N.J. Super. 435, 439 (App. Div. 1967).

N.J.S. 2A:84A-17(1).

U.S. v. Garguillo, 310 F. 2d 249, 252 (2 Cir. 1962).

U.S. v Kelly, 349 F. 2d 720, 769 (2 Cir. 1965), certification denied 384 U.S. 947 (1966).

State v. De Stasio, 49 N.J. 247 (1967).

NOTE: The defendant's individual consent to giving this charge should be obtained.

NOTE: Where non-testifying defendants disagree as to whether the charge should be given, it is preferable to give the charge as to all defendants. See State v. McNeil, ____ N.J. Super. ____ (App. Div. 1978) and Lakeside v. Oregon, 435 U.S. 333 (1978).

Approved: 4/18/77

4.140 EXPERT TESTIMONY

A general rule of evidence is that witnesses can testify only as to facts known by them. This rule ordinarily does not permit the opinion of a witness to be received as evidence. However, an exception to this rule exists in the case of an expert witness who may give his opinion as to any matter in which he is versed which is material to the case. In legal terminology, an "expert witness" is a witness who has some special knowledge, skill, experience, or training that is not possessed by the ordinary juror, and who thus may be able to provide assistance to the jury in its fact-finding duties.[1]

In this case,

(List of Experts)

were called as experts and they testified.

You are not bound by such experts' opinion, but you should consider each opinion and give it the weight to which you deem it entitled, whether that be great or slight, or you may reject it. In examining each opinion, you may consider the reasons given for it, if any, and you may also consider the qualifications and credibility of the expert.[2]

It is always within the special function of the jury to decide whether the facts on which the answer of an expert is based actually exist, and the value or weight of the opinion of the expert is dependent upon and no stronger than the facts on which it is predicated.

OPTIONAL CHARGE CONCERNING HYPOTHETICAL QUESTIONS

[In examining an expert witness, counsel may propound to him a type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a hypothetical state of facts and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of the failure of proof on the value and weight of the expert opinion based on the assumption.][3]

OPTIONAL CHARGE IN CASE OF CONFLICTING EXPERT TESTIMONY

[In resolving any conflict that may exist in the testimony of expert witnesses, you must weigh one expert's opinion against that of the other, and you must consider the reasons given by one as compared with those of the other, and you should consider the relative credibility and knowledge of the experts who have testified. Thereupon, you should find in favor of that expert testimony which, in your opinion, is entitled to the greater weight. Nevertheless, you must always keep in mind that the State has the burden of proving the crime and each of its elements beyond a reasonable doubt. If you should find that a State's expert is more credible than a defense expert, you must still consider whether

the conflict in expert testimony may have created reasonable doubt concerning the crime or one of its elements.]

OPTIONAL CHARGE CONCERNING FEE PAID TO EXPERT

[You are instructed that the amount of the expert witness's fee is a matter which you may consider as possibly affecting the credibility, interest, bias, or partisanship of the witness. However, since all expert witnesses expect to be paid and are paid, you are instructed that there is nothing improper in the expert witness being paid a reasonable fee for his work and for his time in attending court.]

1. This cautionary definition of "expert witness" is provided to counterbalance the "myth cult of the expert to whom too many individuals are inclined to look for wisdom." Dissenting opinion of Judge Matthews in Biro v. Prudential Ins. Co. of America, 110 N.J. Super. 391, 404 (App. Div. 1970) adopted as the Court's opinion in 57 N.J. 204.

2. Evidence Rule 8(1): "When the qualification of a person to be a witness *** is *** subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. *** This rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility."

3. Evidence Rule 58: "Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires."

SOURCES:

1. Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, California Jury Instructions, Criminal, §2.82 at 66 (3d rev. ed. 1970), "Concerning Hypothetical Questions."

2. G. Alexander, Jury Instructions on Medical Issues, §6-6 at 341 (1965) "Opinion Testimony an exception to usual rule."

3. Id §6-30 at 350, "Conflicting Testimony of Experts."

4. Id §6-42 at 354, "Fee Paid to Testifying Expert May be Considered."

Approved: 2/1/77

4.150 FALSE IN ONE - FALSE IN ALL

(A TRIAL JUDGE, IN HIS DISCRETION, MAY GIVE THIS CHARGE IN ANY SITUATION IN WHICH HE REASONABLY BELIEVES A JURY MAY FIND A BASIS FOR ITS APPLICATION - SEE STATE v. ERNST, 32 N.J. 567 (1960)).

If you believe that any witness or party willfully or knowingly testified falsely to any material facts in the case, with intent to deceive you, you may give such weight to his or her testimony as you may deem it is entitled. You may believe some of it, or you may, in your discretion, disregard all of it.

State v. Ernst, 32 N.J. 567, 583 (1960)
State v. D'Illopito, 22 N.J. 318, 324 (1956)
State v. Sturchio, 127 N.J.L. 366, 369 (Sup. Ct. 1941)
State v. Samuels, 92 N.J.L. 131, 133 (Sup. Ct. 1918)

The same charge applies to the civil side.

Lawnton v. Virginia Stevedoring Co., 50 N.J. Super. 564, 581 (App. Div. 1958)
Hargrave v. Stockloss, 127 N.J.L. 262, 266 (E.&A. 1941)
Coleman v. Public Service Co-ordinated Transport, 120 N.J.L. 384, 387 (Sup. Ct. 1938)

For a full discussion of the use and application of the maxim see,

Vol. 3A Wigmore on Evidence (1970) Sec. 1008 et. seq.

4.151 FIREARM - OPERABILITY

In determining what constitutes a revolver, you must look at N.J.S.A. 2A:151-1, which defines a firearm as follows:

> Firearm or firearms includes any pistol, revolver, rifle, shotgun, machine gun, automatic and semi-automatic rifle, or other firearm as the term is commonly used, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectile, ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances.
>
> It shall also include, without limitation, any firearm which is in the nature of any air gun, spring gun or pistol, carbon dioxide or compressed air gun or pistol, or other weapon of a similar nature in which the propelling force is a spring elastic band, carbon dioxide, compressed or other gas, or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than 3/8 of an inch in diameter, with sufficient force to injure the person.

From the above definition of a firearm, it is obvious that the firearm be operable or fireable.

Where it is alleged that the "weapon" is in fact not a "weapon" or is so defective because of a mechanical defect that it cannot be fired so that it does not come within the definition of a firearm, as I have defined that term to you, it is necessary that you first determine if in fact the alleged "weapon" is in fact of the character prohibited by Law. To aid in this decision

you should remember that a firearm is no less a firearm if it is rendered temporarily inoperable because of a missing and easily replaceable part or by need of some minor repair or adjustment.

A deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment, (if the parts, with reasonable preparation, may be easily assembled so as to be effective. What constitutes "reasonable preparation", within this rule, depends on the time required, changes to be made, parts to be inserted, and all other attendant factors.) A weapon designed for firing projectiles may be so defective or damaged that it loses its initial character as a firearm, but that character is not lost when a relatively slight repair, replacement, or adjustment will make it an effective weapon.

A weapon not ready for immediate use can still be "operable" if it can readily be made capable of being fired.

The scope of the statute incompasses those "inoperable" weapons which without undue effort or an inordinate amount of time can be made operable.

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See State v. Morgan, 121 N.J. Super, 217 (App. Div. 1972) - operability

When someone testifies that, based on his experience and his observation of just the handle of a gun, that the gun was "real", this testimony amounts to a rational inference tantamount to legal proof of the fact, that the gun was capable of being fired. State v. Schultheis, 113 N.J. Super. 11, 16 (App. Div. 1971)

4.152 FLIGHT

There has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defendant denies any flight. (or, the defendant denies that the acts constituted flight). The question of whether the defendant fled after the commission of the crime is another question of fact for your determination. If you find that the defendant, fearing that an accusation would be made against him or that he would be arrested, took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of consciousness of guilt.

OR

(The following should be used where the defendant has not denied flight but has offered an explanation)

There has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the crime. The defendant has offered the following explanation:

(Set forth facts testified to by defendant)

If, after a consideration of all the evidence, you find that the defendant, fearing that an accusation would be made against him on the charge involved in the indictment or an arrest by reason thereof, took refuge in flight for the purpose of evading the

accusation or arrest, then you may consider such flight in connection with all the other evidence in the case, as an indication or proof of a consciousness of guilt.

State v. Petrolia, 45 N.J. Super. 230 (App. Div. 1957).

State v. Centalonza, 18 N.J. Super. 154, 161 (App. Div. 1952).

Note: Mere departure from the scene is distinguished from flight.

See: State v. Sullivan, 43 N.J. 209 (1964).
State v. Jones, 94 N.J. Super. 137 (App. Div. 1967).

Note: State v. Wilson, 57 N.J. 49 (1970) states: "You the jury must first find that there was a "departure" from the scene and then you must also find a motive which would turn the departure into flight." This charge may be necessary to include contingent upon the right factual context.

Approved: 2/1/77

4.153 FRESH COMPLAINT

Generally, crimes involving sex are not perpetrated in public view. They frequently happen in seclusion and in the shadows; and by reason of these circumstances usually the only witnesses are the accuser and the accused.

Consequently, the court is often faced with directly conflicting testimony and so has adopted the rule of permitting testimony of a "fresh complaint" to bolster the credibility of the abused female.

The reason for allowing such testimony is based on the nature of the indignity. A person undergoing such an act would be expected to complain to a parent or other person of authority to whom she would probably turn to vent and express her feelings because of the insult* to her dignity.

Such evidence, though hearsay, is permitted <u>but only for the purpose of supporting the credibility of the victim's complaint and not as corroboration of the alleged offense</u>.

You may consider the circumstances and time when the complaint was made, i.e., whether or not it was made within a reasonable time after the event, the demeanor and emotional condition of the victim while making the complaint, as well as her physical appearance, marks of violence, and other like indications, if any,

* "But the exception has come to us as a matter of ancient tradition and practice. Wigmore says: 'The tradition went back by a continuous thread to the primitive rule of hue and cry.' §1135, p. 219." <u>State v. Gambutti</u>, 36 <u>N.J. Super</u>. 219, 228 (App. Div. 1955).

that are confirmatory of her testimony.** All of these factors go to the question of credibility to be accorded to the alleged victim's complaint.

SEE:

(1) State v. Saccone, 7 N. J. Super. 263 (App. Div. 1950)

(2) State v. Gambutti, 36 N. J. Super. 219 (App. Div. 1955)

(3) State v. Hintenberger, 41 N. J. Super. 597 (App. Div. 1956), certif. den., 23 N. J. 57 (1956)

(4) State v. Balles, 47 N. J. 331 (1966)

(5) State v. Simmons, 52 N. J. 538 (1968) cert. denied, 395 U.S. 924 (1969)

(6) State v. Tirone, 64 N. J. 222 (1974)

(7) 4 Wigmore, § 1134 et seq. (3rd Ed. 1940)

The trial judge should note that the most frequent problem met under the doctrine of Fresh Complaint is as to the amount of detail that may be adduced when the parent or person in authority testifies as to what the victim told him or her.

Balles sets forth Wigmore's three principles as follows:

(1) As a general rule no details may be elicited. Evidence of the mere complaint is offered only to negate the "contradiction" resulting from any absence of complaint.

(2) Details of the complaint may be adduced if the witness has been impeached. See, however, Saccone, supra, which distinguishes between mere cross examination on the one hand and, on the other, proof of a prior contradictory statement or an attack upon the victim's general reputation for truth and veracity.

**See State v. Saccone, 7 N. J. Super. 263, 266. (App. Div. 1950)

(3) Details may be admitted where the complaint was so spontaneous and immediate as to fall under the res gestae doctrine. See Simmons which holds that the complaint was spontaneous - despite the lapse of time - where a deaf mute was still in a state of excitement. It also holds that the complaint was spontaneous although in response to an inquiry and, further, that such complaint was admissible although the deaf mute victim (with limited mentality) was incompetent to testify at the trial.

It should also be noted that we still have the doctrine of Fresh Complaint in sex cases despite Evidence Rule 20 which provides that no evidence of a prior consistent statement to support the credibility of a witness should be admitted except to meet a charge of recent fabrication.

4.154 WITNESS - FAILURE OF A PARTY TO PRODUCE

NOTE: In most cases it will be the Judge who determines whether an adverse inference may or may not be drawn from a party's failure to call a witness. Wild v. Roman, 91 N.J.Super. 410, 416 (App. Div. 1966). If the Judge determines that the adverse inference may or may not be drawn, he may use alternative charges B, C, or D. In making his determination whether an adverse inference may or may not be drawn, the Judge may consider the non-exhaustive list of criteria (1-5) in alternative charge A.

If there are any factual disputes concerning whether the adverse interest may or may not be drawn, the determination must be left to the jury and alternative charge A should be used.

(A) WHERE COURT DETERMINES THAT THERE IS AN ISSUE OF FACT AS TO ONE OR MORE OF THE CRITERIA

During the course of this trial, reference has been made to _____ as a witness in this matter (as having information relevant to the matter before you) and that the state/defendant has failed to call him to testify. If you find that _____ is a person whom you would naturally expect that state/defendant to produce to testify, you have a right to infer from the non-production of this witness that his testimony would be adverse to the interest of the state/defendant.

The basis for this rule is that where a party fails to produce a witness who probably could elucidate certain facts in issue, it raises a natural inference that the non-producing party fears that the testimony of the witness on that issue would be unfavorable to him.

However, an adverse inference should not be drawn:

(1) If _____ is not a witness whom the state/defendant would naturally be expected to produce,

such as a person who is, by his position, likely to be so prejudiced against that party that the party could not be expected to obtain the unbiased truth from him.[1]

(2) If there has been a satisfactory explanation for his non-production; or

(3) If he is equally available to both parties; or

(4) If his testimony would be comparatively unimportant, cumulative in nature or inferior to that which you already have before you.

(5) [Note: When the witness is an expert witness] If it would be too expensive to call the witness, or too great an imposition upon the witness' time and profession as compared with the importance of his testimony and the value of the litigation.[2]

Whether or not an adverse inference should be drawn is for your determination based upon the principles I have just set forth.

COMMENTS

The appropriate criteria may be selected by the Judge and molded to fit his particular case.

Judge Gaulkin in Wild v. Roman, Supra. discussed the following principles in determining whether or not the absent witness charge should be given (91 N.J.Super. at p. 414):

> "In Clawans the Court stressed the 'peculiar facts' before it. Therefore we doubt that Clawans always compels the giving of such a charge when a possible witness does not appear, even upon request and even if the rules laid down in Clawans and hereafter discussed are complied with.

1. State v. Clawans, 38 N.J. 162, 171 (1962)
2. Wild v. Roman, 91 N.J.Super. 410, 416 (App.Div. 1966)

Be that as it may, Clawans did not hold that the charge was to be given merely because a person who apparently knew something about some facet of the case did not appear and testify. We think Clawans made it abundantly clear that (1) the charge is not to be given unless the judge is first satisfied that giving it is clearly justified as to a particular witness or a particular class of witnesses, and (2) the charge, if given, must identify the witness or class of witnesses in question and the issues upon which their testimony might have been helpful. See Clawans, at p. 173, and Justice Francis's dissenting opinion therein, at pp. 175-176.

"Clawans restated the conditions precedent for such a charge. It must appear that it was within the power of the party to produce the witness. The inference 'is based not on the bare fact that a particular person is not produced as a witness * * * but on his non-production when it would be natural for the party to produce the witness.' (citation omitted.) It must appear reasonably probable that the witness "could testify to specifically identifiable facts.' (citation omitted.), and, even then, that his evidence would not be merely cumulative, but 'superior to that already utilized in respect to the fact to be proved.' (citation omitted.) The inference is not proper if the witness is available to both parties or 'by his position would be likely to be so prejudiced against the party that the latter would not be expected to obtain the unbiased truth from him * * *.'"

NOTES:

(1) Specify Witnesses Involved

Since the absent witness charge should not be given as to all absent witnesses, to avoid confusion the charge should be related specifically to those witnesses to whom it applied. Biruk v. Wilson, 50 N.J. 253, 261 (1967).

As stated above a different charge may be required with respect to the absence of different witnesses. As to some absent witnesses an adverse inference may be drawn, but as to others the only inference that may be drawn is that witness' testimony would not have specifically contradicted the evidence offered by an adversary and would not have materially aided a given party's case. In some cases no adverse or other inference can be drawn.

(2) Procedure Before Giving Charge

A party desiring an adverse inference charge should advise the trial judge and counsel out of the jury's presence at the close of his adversary's case of his intention to request the adverse inference charge as to particular persons not called and the reasons why the charge should be given. The adversary should then be given the opportunity to either call the designated witness or demonstrate to the court "by argument or proof" the reason for the failure to call.

Depending upon the circumstances disclosed, the trial court may decide the failure to call the witness raises no inference, or an unfavorable one, and whether reference in the summation or charge is warranted. State v. Clawans, 38 N.J. 162, 172 (1962)

(3) Construction of "Equally Available" to both parties.

An adverse inference does not arise as to the ordinary witness whose testimony would likely be as favorable to one party as to the other. Whether a witness is "equally available" is not to be determined from mere physical presence, but the court should consider the relationship of the witness to a party and other factors related thereto. Hickman v. Pace, 82 N.J.Super. 483, 492 (App.Div. 1964). Defendant testified that the witnesses were out of state, that he had asked them to come in, and testify as witnesses for him, but they had refused. See also, Michaels v. Brookchester, Inc. 26 N.J. 379, 391 (1958).

(4) Failure to Take Depositions of Unavailable Witnesses

See, O'Neil v. Bilotta, 18 N.J.Super. 82, 87 (App. Div. 1952) aff'd 10 N.J. 308 (1952) as to the effect of not taking the deposition of an out-of-state witness.

(B) WHEN COURT HAS DETERMINED THAT THE ADVERSE INFERENCE MAY BE DRAWN

Reference has been made to _____ (as a person who has information relevant to the matter before you) and that the state/defendant has failed to call him to testify.

The rule is that where a party (state/defendant) fails to produce as a witness a person whom that party would naturally be expected to call to testify, you have a right to infer that had the wintess been produced he would have testified adversely to the interests of that party (state/defendant).

The reason for this rule is that where you would normally expect a party to call a person as a witness and that party, without reasonable explanation, fails to do so, it leaves a natural inference that the non-producing party fears exposure of facts which would be unfavorable to him.

See, State v. Clawans, 38 N.J. 162 (1962); Michaels v. Brookchester, Inc., 26 N.J. 379 (1958); O'Neil v. Bilotta, 18 N.J.Super. 82 (App.Div. 1952); aff'd 10 N.J. 308 (1952; Hickman v. Pace, 82 N.J.Super 483, 490 (App. Div. 1964).

(C) WHERE COURT HAS DETERMINED TO CHARGE NO ADVERSE INFERENCE CAN BE DRAWN

During the course of this trial, reference has been made to _____. The Court has determined that the non-production of _____ as a witness is excusable as a matter of law. Therefore, you should not speculate as to what his testimony would be had he been called to testify. Nor may you draw any inferences against or in favor of either party from his failure to testify.

(D) WHERE TESTIMONY IS NOT OF A MATERIAL AID

From the testimony it would appear that (Dr. _____) is a person who has information relative to the (medical) issues involved, and that the state/defendant has failed to call him as a witness. The failure of a party to produce as a witness a person whom that party would naturally be expected to call does not necessarily permit the inference that the testimony of that witness would have been unfavorable to that party.

In the circumstance of this case, however, you may infer that this witness would not have specifically contradicted the testimony of witnesses (Dr. _____) called by the state/defendant and that the evidence of the absent witness would not have materially aided state's/defendant's case.

COMMENTS:

In Parentini v. S. Klein Dept. Stores, 94 N.J.Super. 452 (App.Div. 1967), a false imprisonment case, plaintiff produced two doctors who testified as to the causal relation between the eipsode and

4.154 WITNESS

the psychiatric condition of plaintiff and as to permanency. A neurologist examined plaintiff for defendant but was not called. Defendant offered no medical testimony. The court held that the usual adverse inference charge was error. The court noted that medical experts are often not called because their testimony would not be helpful enough to warrant the expense or intrusion on professional time, or the opinion offered may not be helpful to that party even though it is not adverse to that party. In the circumstances it was held that the trial court in its discretion could have charged that the jury could infer from the non-production of defendant's medical expert that his testimony "would not have specifically contradicted that of plaintiff's experts and it would not have materially aided defendant's case." (at p.457)

Approved: 7/11/77

4.160 HABITUAL OFFENDER

(N.J.S.A. 2A:85-12)

The defendant has been charged in this Accusation with being an Habitual Offender in violation of N.J.S.A. 2A:85-12. That statute in its pertinent parts provides as follows:

> "Any person convicted on three separate occasions of high misdemeanors in this State, or of crimes under the laws of the United States or any other State or Country, which crimes would be high misdemeanors under the laws of this State, or whose convictions for such offenses in this State or under the laws of the United States or any other State or Country shall total three or more, and who thereafter is convicted of a misdemeanor or a high misdemeanor under the laws of this State, is hereby declared to be an habitual criminal, and the Court in which such fourth or subsequent conviction is had, may impose upon the person so convicted a sentence (as prescribed by this law).
>
> Conviction of two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction."

In every criminal case the burden is on the State to prove all of the essential elements of the crime charged to your satisfaction beyond a reasonable doubt. In this case there are four essential elements which must be so proved by the State before you may find the defendant guilty. They are:

First: There have been three prior convictions on separate occasions of high misdemeanors in this State, or any other State,

the United States or any other Country; (if there are convictions arising from a foreign jurisdiction -- that is, one other than this State -- that they would be high misdemeanors in this State);

Second: There has been thereafter a separate conviction of a misdemeanor or a high misdemeanor under the Laws of this State;

Third: That defendant is the same person who was convicted on the three previous separate occasions; and,

Fourth: That this defendant is the same person who was convicted of a misdemeanor or high misdemeanor (crime) under the laws of this State.

The State alleges that he was previously convicted on three separate occasions of high misdemeanors in the State prior to (date of last conviction), namely,

1. The crime of _____ on _____ in _____ County.
2. The crime of _____ on _____ in _____ County.
3. The crime of _____ on _____ in _____ County.

I charge you that each of the above crimes are high misdemeanors, so the only issue as to these to decide is whether the defendant was so convicted.

The State further alleges that following these three convictions he has been since convicted of a high misdemeanor (misdemeanor) namely _____ on _____ in this county.

I charge you also that you are to decide whether he was so convicted.

You are not to decide the guilt or the innocence of the defendant of any of the alleged prior convictions, you are only to decide if this defendant _____ has been so previously convicted. Whether the State has proven beyond a reasonable doubt that the defendant was previously convicted of the offenses as alleged is for you to decide.

Where the identity of a person who allegedly committed an offense is in issue, the burden of proving that identity is on the State. The defendant has neither the burden nor the duty to show that the offense was committed by someone else or to prove the identity of that other person.

In considering whether the State has proven that the defendant committed the alleged offenses, you may consider any circumstantial evidence which may tend to prove that the offenses were committed by the defendant, as well as any other evidence which you find identifies the defendant as the perpetrator of the offenses charged.

(INSERT HERE, MODEL CHARGE ON "CIRCUMSTANTIAL EVIDENCE," (4.121).)

(ALSO, SEE NOTE 6 RE: "EXPERT OPINION")

I'm not going to direct any order for you to follow in your deliberations, but suggest the following may make your task a little easier.

First you should determine whether the State has proven

beyond a reasonable doubt whether it was the defendant who was convicted on or about _____ on Indictment No. ____ of the crime of _____ in _____ County.

If you find he was, you will indicate Yes on your verdict form. If you find he was not, you will indicate No.

Next you should determine whether the State has proven beyond a reasonable doubt whether it was the defendant who was convicted on or about _____ on Indictment No. ____ of the crime of _____ in _____ County.

If you find he was, you will indicate Yes on your verdict form. If you find he was not, you will indicate No.

Next you should determine whether the State has proven beyond a reasonable doubt whether it was the defendant who was convicted on or about _____ on Indictment No. ____ of the crime of _____ in _____ County.

If you find he was, you will indicate Yes on your verdict form. If you find he was not, you will indicate No.

Finally, you should determine whether the State has proven beyond a reasonable doubt whether it was the defendant who was convicted on or about _____ on Indictment No. ____ of the crime of _____ in _____ County.

If you find he was, you will indicate Yes on your verdict form. If you find he was not, you will indicate No.

Based upon your answers to these questions on the verdict form, I will then appropriately mold the verdict of guilty or not guilty to the Accusation.

NOTES

1. The Habitual Offender Act does not create another substantive offense but only enhances the punishment maximums. State v. Washington, 47 N.J. 244 (1966); Janiec v. McCorkle, 52 N.J. Super. 1 (App. Div. 1958), cert. den., 362 U.S. 944 (1960); Ex Parte Zee, 13 N.J. Super. 312 (L.D. 1951), aff'd., 16 N.J. Super. 171 (App. Div. 1951), cert. den., 343 U.S. 931 (1952); State v. McBride, 12 N.J. Super. 402 (L.D. 1951), aff'd., 15 N.J. Super. 436 (App. Div. 1951), cert. den., 342 U.S. 894 (1951).

2. Defendant is permitted to attack the constitutional validity of a prior conviction or the jurisdiction of the court in which it was obtained. Burgett v. Texas, 398 U.S. 109 (1967); Janiec v. McCorkle, supra; State v. Miscavage, 62 N.J. 294 (1973).

3. See additional notes in Sentencing Manual for Judges under Habitual Offenders (Sec. 3.2).

4. Quaere: Can the trial court now notice records of convictions pursuant to Evidence Rule 9(2)(b) when such convictions are necessary to sustain an independant charge? Prior to the enactment of Evidence Rule 9(2) it was stated in dicta that prior convictions could not be judicially noticed for purposes of sustaining convictions under the Habitual Offender's Act. State v. McBride, supra. See annotation under the Evidence Rule.

5. Quaere: Under the theory of the doctrine of lesser included offenses, for purposes of sentencing, if the jury in its verdict form answers "yes" to one or two of the prior convictions alleged in the Accusation charging defendant with being an Habitual Offender but not all three prior convictions, may he not be sentenced on his last conviction as a multiple offender under either N.J.S. 2A:85-8 (second offense) or N.J.S. 2A:85-9 (third offense)?

6. Where expert testimony regarding fingerprints, etc. has been given, the model charge on "EXPERT OPINION" may be inserted here.

4.180 IDENTIFICATION 1/30/78

Cautionary charges on the use of IDENTITY POLICE PHOTOS 4.180-A and FINGERPRINTS 4.180-B for corroboration of identifications have been appended to the four-page charge on IDENTIFICATION 4.180 adopted 6/30/72.

4.180 IDENTIFICATION

NOTE: Whether or not a separate charge on the subject of identification is necessary depends upon the situation presented in an individual case. The Committee recognizes that in a simple case the issue may be submitted to the jury wholly within the framework of a charge on credibility generally. However, where the issues presented are multi-faceted and somewhat complex consideration should be given to an in-depth charge. The Committee is of the view that a model charge fit for universal application is impossible of formulation. The following suggested charge is intended as a tool and should not be delivered without some forethought.

The defendant as part of his general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense. Where the identity of the person who committed the crime is in issue the burden of proving that identity is upon the State. The State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else or to prove the identity of that other person. You must determine, therefore, not

only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.

In order to meet its burden with respect to the identification of the culprit the State has presented the testimony of the witness _____. You will recall that this witness identified the defendant in court as the person who committed the offense. According to the witness, his identification of the defendant in court is based upon the observations and perceptions which he made of the defendant on the scene at the time the offense was being committed. It is your function as jurors to determine what weight, if any, to give to this testimony. You must decide whether it is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offense charged.

In going about your task you should consider the testimony of the witness in the light of the customary criteria concerning credibility as I have explained them to you. It is particularly appropriate

that you consider the capacity or the ability of the witness to make observations or perceptions as you guage it to be and that you consider the opportunity which the witness had at the time and under all of the attendant circumstances for seeing that which he says he saw or that which he says he perceived with regard to his identification of the person who committed the alleged offense.

(Here consider briefly reviewing the conflicting contentions of the State and the defendants relating to the above)

Unless the in-court identification results from the observations or perceptions of the defendant by the witness during the commission of the crime rather than being the product of an impression gained at the out-of-court identification procedure it should be afforded no weight. Thus the ultimate issue of the trustworthiness of an in-court identification is for you to decide.

If, after a consideration of all of the evidence, you have a reasonable doubt as to the identity of the

defendant as the person present at the time and place of the crime you must acquit him. If, however, after a consideration of all of the evidence you are convinced beyond a reasonable doubt of his presence at the scene you will then consider whether the State has proved each and every element of the offense charged beyond a reasonable doubt.

Footnote

See Trial Problems In Administration Of "Wade" Rules On Identification by Hon. Milton B. Conford, July 1970, distributed by the Administrative Director. Note particularly paragraph (8) on page 3

See Supplement thereto dated October 1972.

4.180-A IDENTITY POLICE PHOTOS 1/30/78

There are in evidence some photographs used to identify the defendant in this case.

With reference to the photographs submitted into evidence, you will notice that they have all been taken by police (and have been referred to during this trial as "mug shots"). However, these pictures indicate merely that they have been taken by police in the standard manner.

You are not to consider the fact that these are police photographs as prejudicing the defendant in any way. The photographs are not evidence that the defendant has ever been convicted of or even arrested for any crime and are not to be considered as such by you.

The fact that the police are in possession of a photograph does not mean that the subject has a criminal record. Such photographs come into the hands of the police for many reasons, such as for license, permit or passport applications and their source is wholly unconnected with criminal activity.

4.180-B FINGERPRINTS 1/30/78

There was testimony that the F.B.I (or law enforcement agency) had fingerprints of the defendant on file. You are not to consider that fact as prejudicing the defendant in any way. That fact is not evidence that the defendant has ever been convicted of or even arrested for any crime and is not to be considered as such by you.

The fact that the F.B.I. (or law enforcement agency) is in possession of finger prints does not mean that the subject has a criminal record. Such finger prints come into the hands of law enforcement agencies such as the F.B.I. for many legitimate reasons such as military service, federal service, passport applications and the like and their source is wholly unconnected with criminal activity.

Approved: 9/1/76

4.181 INTENT

Intent, is a condition of the mind which cannot be seen and can only be determined by inferences from conduct, words or acts. Intent means a purpose to accomplish something, a resolution, a resolve to do a particular act or to accomplish a certain thing. [Where appropriate and particularly where intent is an issue, charge the following:]

It is the design, resolve or determination with which a person acts. It expresses mental action at its most advanced point, or as it actually accompanies an outward corporal act. Intent shows the presence of will in the act which consummates a crime. It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of action, willing and electing to do it.[1]

Intent, being a state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts.[1] Therefore, it is not necessary, members of the jury, that witnesses be produced to testify that an accused said he had a certain intent when he engaged in a particular act. His intention may be gathered from his acts and his conduct, and from all he said and did at the particular time and place, and from all of the surrounding circumstances.

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[1]Black's Law Dictionary (4th Edition) p. 947.

Cf. State v. Monahan, 15 N.J. 34, 49, 50 (1954).

"Yet a criminal intent is not necessarily an intent to do wrong; the voluntary doing of a forbidden act may be enough."

Morss v. Forbes, 24 N.J. 341, 359 (1957).

Motive is not to be confused with intent.

In this same case likewise at page 359 the court stated: "The accused must intend to act in the way proscribed by the statute, but it is immaterial that he does not know or believe his conduct violates the law.

Even positive belief that the act is lawful should not exempt the doer from criminal responsibility."

Idem. State v. Hanly, 127 N.J. Super. 436, 445, 446 (1974) and State v. Savoie, 67 N.J. 439, 460, 461 (1975).

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April 2, 1980

MEMORANDUM TO: All Judges

FROM: Leonard Lance, Staff Attorney LL
Model Criminal Jury Charges Committee

RE: "Allen Charge"

Judge John A. Marzulli, J.S.C., Chairman of the Supreme Court's Model Criminal Jury Charges Committee, has requested that I inform you that the Supreme Court of New Jersey has today directed that hereafter in criminal cases trial courts should not utilize New Jury Model Criminal Jury Charge 4.190, JURY UNABLE TO AGREE ON A VERDICT. State v. Czachor, ____ N.J. ____ (1980).

The Supreme Court of New Jersey recommends instead the use of a model charge suggested by the American Bar Association. A copy of this ABA charge is enclosed.

Today's Supreme Court opinion states:

> ...Courts should instruct jurors in accordance with the ABA Standards § 5.4 and should include such instructions in the initial general charge to the jury and, with respect to its repeated use, should be guided in the exercise of sound discretion by such factors as the length and complexity of trial and the quality and duration of the jury's deliberations. State v. Czachor, ____ N.J. ____ (1980) (slip opinion at 23).

LL:ljc

Enclosure

Instruction Recommended for Use by the Supreme Court of New Jersey in Initial General Charge to a Jury in a Criminal Case

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Commentary to § 5.4(a), ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial Jury (Approved Draft 1968), at 146-147 (quoting Jury Instructions and Forms for Federal Criminal cases, 27 F.R.D. 39, 97-98 (1968)).

Approved: 4/10/78

4.190 JURY UNABLE TO AGREE ON A VERDICT

(This supplemental charge is suggested as a guide for the preparation of a jury instruction to meet the circumstances of the case under consideration.)

Ladies and gentlemen, you indicate to the court that you are presently unable to reach a unanimous verdict. The court is not permitted, nor would I wish, to coerce a verdict from you! However, as I charged you originally, your verdict must be unanimous!

In order to convict, all twelve deliberating jurors must agree that the state has proven the defendant guilty beyond a reasonable doubt.

In order to acquit, all twelve deliberating jurors must agree that the state has not met the burden of proving the defendant guilty beyond a reasonable doubt.

Your verdict must be based only on the evidence admitted during the course of the trial and on the law as charged. Again, you are to decide the case without any bias, prejudice, or sympathy to either side and without reference to any suspicion or conjecture.

I appreciate that you have most conscientiously been following your oaths as jurors to deliberate. But another part of that oath is to come to a unanimous verdict, if possible, without surrendering personal scruples or convictions.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of all evidence with your fellow jurors.

Each juror should listen, with that disposition toward reaching a verdict, to the arguments and views of fellow jurors.

The very object of our jury system is to secure unanimity by comparison of views and by discussion among jurors, provided this can be done reasonably and consistently with the conscientious convictions of each juror. You should make every effort to reach such a verdict short of yielding a conscientiously held view merely for the sake of agreement.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it was erroneous. But again, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember that you are not partisans. You are the sole judges of the facts. Your only interest is to ascertain the truth from the evidence admitted during the course of the trial.

It is of course eminently desirable that if you reasonably can, you agree upon a verdict.

You are sophisticated enough to appreciate that this case must at some time be concluded. Great care was taken in your selection, and you were selected in the manner and from the same source that any future jury might be selected. There is no reason to suppose that this case would ever be submitted

to 12 persons more intelligent, more impartial or more competent to decide it.

I therefore respectfully request that you be good enough to return to the jury room and give the matter further thought and consideration. You may be as leisurely in your deliberations as the occasion requires. Consider everything I said in my original charge. Be patient and give careful and deserving attention to the views of your fellow jury members. Keep an open mind and again remember our law contemplates that you shall by discussion and comparison of views secure a unanimous verdict.

Permit your cool, calm and dispassionate judgment to settle the issues, and render such verdict as is warranted by the evidence under the law.

Thank you so much!

Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L. Ed, 528 (1896); State v. Williams, 39 N.J. 471 (1963), cert. den. 374 U.S. 855, 83 S.Ct. 1924, 10 L. Ed. 2d 1075; In re Stern, 11 N.J. 584 (1953); State v. Hutchins, 43 N.J. 85 (1964); State v. Cottone, 52 N.J. Super. 316 (App. Div. 1958); State v. DiModica, 40 N.J. 404 (1963); United States v. Thomas, 449 F. 2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F. 2d 407 (3d Cir. 1969); United States v. Flannery, 451 F. 2d 880 (1st Cir. 1971); Powell v. United States, 297 F. 2d 318 (5th Cir. 1961); Thaggard v. United States, 354 F. 2d, 735 (5th Cir. 1965); People v. Richards, 237 N.E. 2d 848 (Ill. 1968), 23A C.J.S. Criminal Law Section 1380 p. 1014; New York Pattern Jury Instructions - Civil, Section 1:100 (1965); American Bar Association, Standards Relating to Trial by Jury, 145-46 (1968) Section 5.4 27 F.R.D. 39, 97-98; 100 A.L.R. 2d 177 Annot: Dissenting Jurors - Instructions.

Approved 1/24/79

4.191 ALTERNATE JUROR EMPANELLED AFTER DELIBERATIONS HAVE BEGUN

As you know, Juror #_____ has been excused from the jury. An alternate juror has been selected to take his (or her) place. Because of this change in your jury, you must set aside and disregard all of your past deliberations and begin your deliberations again, just as if you were now entering the jury room for the first time directly after listening to my charge. In beginning your deliberations again, you must eliminate any impact that Juror #_____ may have had on your deliberations, and consider the evidence in the context of full and complete deliberations with the new member of your jury.

NOTE: See State v. Lipsky, ____ N.J. Super. ____, (App. Div. 1978), where the Court reversed a conviction when no such charge was given after an alternate was empanelled. In dictum, the Court in Lipsky also noted the following additional procedural defects at trial: 1) failure to select the alternate by drawing one of the two names by lot as specified in R.1:8-3; 2) failure to give specific instructions to the two alternates not to discuss the case between themselves or with others; and 3) failure of the judge to question alternate Rayner whether he had discussed the case with the other alternate during their sequestration together. Read the case for suggested alternatives before excusing a juror.

Approved: 7/11/77

4.250 POLYGRAPH

As a general rule, in New Jersey, neither the State nor the defendant may offer in evidence in a criminal trial the results of a polygraph test administered to the defendant. The results of such tests are not considered as conclusive under the law.

However, where the State and the defendant, as in the present case, agree before trial to the administering of a polygraph test to the defendant, and also stipulate that either party may offer in evidence at the trial of the matter the results thereof, whether favorable or unfavorable, then the opinion of the expert who administered the test as to the results of that test are admissible in evidence.

I instruct you that the expert's opinion testimony as to the results of his examination does not prove or disprove any element of the crime charged under the indictment, but merely indicates that at the time he questioned the defendant, in his expert opinion, the defendant was not answering (answered) truthfully the relevant questions asked.

Therefore, the expert's opinion that the defendant answered certain relevant questions deceptively (truthfully) is not by itself sufficient evidence to support a finding of guilt (or innocence). It is, however, probative evidence of the issue of guilt (or innocence) and may be considered by you along with all of the other evidence in the case, bearing upon the issue of guilt (or innocence).

It is for you to determine what corroborative weight and effect should be given to such expert testimony in this case.

(Charge "Expert Opinion")

State v. Baskerville, __ N.J. __, (decided May 11, 1977).

State v. McDavitt, 62 N.J. 36, 47 (1972)

State v. Valdez, 91 Ariz. 274, 371 P.2d. 894, 901 (Sup. Ct. 1962)

Approved: 9/1/76

4.251 POSSESSION

The word "Possess" as used in criminal statutes signifies a knowing, intentional control of a designated thing accompanied by a knowledge of its character.[1]

Thus, the word "Possess" as used in the statute on which this charge is based means a knowing, intentional control and dominion; the right and power to control, (in this case, a narcotic drug), accompanied by a knowledge that it is (a narcotic drug).

To possess means to knowingly and intentionally have actual control of (a narcotic drug), and not a passing control, fleeting and shadowy in its nature.[2]

(IN APPROPRIATE CASE)

(A person may possess (a narcotic drug) even though it was not on his person at the time of the arrest, if in fact he had it immediately before his arrest and had control and dominion over it).

When we speak of possession, we mean a conscious, knowing possession. Possession is not unlawful unless the possessor also knows the substance was (a narcotic drug). You will note that the statute uses the phrase "to possess, actually or constructively." The law recognizes two kinds of possession, they are Actual Possession and Constructive Possession.

ACTUAL POSSESSION

A person is in actual possession of a particular article or thing when he knows what it is, that is, he has knowledge of its character and knowingly has it on his person at a given time.

CONSTRUCTIVE POSSESSION

The law recognizes that possession may be constructive instead of actual. A person who, with knowledge of its character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it.

Constructive possession means possession in which the property, though not physically on one's person, is so located that he is aware of the presence of the property and is able to exercise intentional control over it.

A person who, although not in actual possession, with knowledge of its character, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

JOINT POSSESSION

The law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual

or constructive possession of a thing, possession is joint, that is, if they knowingly share control over the article.

1. State v. Reyes, 98 N.J. Super. 506 (App. Div. 1968), certif. denied, 51 N.J. 582 (1968)

2. State v. Brown, 67 N.J. Super. 450 (App. Div. 1961)

State v. Davis, 68 N.J. 69 (1975)

NOTE: There are numerous criminal statutes which include "Possession" as an element. The foregoing is suggested as a basis for the judge to formulate an instruction involving a particular statute. The following are some of the criminal statutes which contain "Possession" as an element of the crime.

2A:94-3	Possessing Burglar's Tools
2A:109-2	Possessing Counterfeit Notes, etc.
2A:109-3	Possessing Plate for Counterfeiting, etc.
2A:109-7	Possessing Foreign Counterfeit Coins
2A:115-2	Uttering Obscene Pictures; See Also 2A:115-3.2
2A:119A-4	Control over Records of Prohibited Loan
2A:121-3	Possessing Lottery Paraphernalia
2A:123-2	Hydrocyanic Acid Gas - Possession Without Permit
2A:127-3	Possessing Motor Vehicle with Trade-Mark or Serial Numbers Altered
2A:139-1	Receiving Stolen Property
2A:144-1	Possession of Stink Bombs
2A:151-2	Pawnbrokers - Weapons
2A:151-5	Additional Sentence for Armed Criminals
2A:151-14	Silencers Forbidden
2A:151-41	Carrying Weapon Without Permit
2A:151-41.1	Possession on School Premises
2A:151-56	Unlawful Use of Dangerous Weapons
2A:151-58	Possession of Bombs; See Also 2A:151-59
2A:151-60	Possession of Explosives
2A:151-62	Switchblades, etc.
24:21-20	Unlawful Possession of Narcotics

Approved: 7/11/77

4.260 RECANTING WITNESS

As to the testimony of _____called by the _____ you will recall when he/she was on the stand the _____claimed surprise. When a party is surprised by the testimony of its own witness it may introduce evidence of an inconsistent statement made by the witness at an earlier date to neutralize or cancel that part of the testimony of the witness which was inconsistent with the prior statement and thus unexpected by the party calling the witness.

You may therefore consider the prior statement of this witness in deciding whether to believe that part of the testimony this witness has given before you which is inconsistent with that statement. Whether or not the credibility of that part of the testimony of the witness is affected by the prior statement is for you to determine considering all of the facts and surrounding circumstances. If you determine that the inconsistent portion of the witness' testimony is not credible, then in effect the slate is wiped clean and you should consider the factual issue involved as if this witness had never testified to it. The prior statement can only serve to neutralize the inconsistent testimony of the witness and having served that purpose is not to be considered by you as

affirmative evidence of the facts therein stated. Therefore if you find the inconsistent portion of the testimony of the witness should be rejected, you must give no further effect to the prior statement either.

You may consider any other testimony of the witness which is not contradicted by the prior statement, and give it such weight, if any, as you believe it is entitled to.

1. Before evidence requiring this charge should be introduced before the jury, the following steps should be taken:

(1) If the proponent has reason to believe in advance that a witness will disavow an earlier statement, the court should be so advised at sidebar and a hearing held outside of the presence of the jury. So much of his testimony as is not neutralized by his prior statement, may thereafter be received before the jury, and this charge is unnecessary. State v. Guido, 40 N.J. 191, 200 (1963). (Pretrial hearing: see State v. Williams, 59 N.J. 493 (1971).)

(2) If the proponent is surprised by the witness' contradictory testimony, the court must outside the presence of the jury first determine:

(a) That the proponent has a prior statement of the witness which is contradictory to his present testimony.

(b) That the proponent had no prior knowledge of the witness' disavowal of his prior statement and is therefore surprised and,

(c) That the present testimony is harmful to proponent's case.

If the court finds the above circumstances have been established, the prior statement with this instruction may be submitted to the jury, but the preliminary findings of the court should not be revealed to them.

State v. Gallicchio, 44 N.J. 540, 547-548 (1965).

4.270 REASONABLE DOUBT

Reasonable doubt is not a mere possible or imaginary doubt, because everything relating to human affairs or depending upon oral evidence is open to some possible or imaginary doubt.

A reasonable doubt is an honest and reasonable uncertainity as to the guilt of the defendant existing in your minds after you have given a full and impartial consideration to all of the evidence. It may arise from the evidence itself or from a lack of evidence.

Source: Committee on Standard Jury Instructions, State of Ohio, 3 O.J.I. Criminal 3.50

Illinois Jury Instructions, Criminal, Sec 4561 et seq.

Holland v. United States, 348 U.S. 121, 140 (1954)

Approved: 9/1/76

4.280 STATEMENTS OF DEFENDANT

There is for your consideration in this case a certain written (or oral) statement alleged to have been made by the defendant.

It is your function to determine whether or not such statement was actually made by the defendant and, if made, whether such statement or any portion thereof is credible.

(HERE DISCUSS THE STATEMENT)

In considering whether or not the statement allegedly made by the defendant is credible, you should take into consideration the circumstances and facts surrounding the giving of the statement, as well as all other evidence in the case.

(HERE DISCUSS ANY PROOF ADDUCED BEFORE THE JURY WHICH FORMERLY WENT TO DEFENDANT'S MIRANDA RIGHTS OR THE STATEMENT'S VOLUNTARINESS)

If, after consideration of all of these factors you determine that the statement was not actually made (given) or that the defendant's alleged statement is not credible then you must disregard the statement completely.

If you find that the statement was made (given) and that part or all of the statement is credible, you may give such weight to that portion of the statement you have found to be truthful and credible as you deem it should be accorded in your deliberations.

State v. Hampton, 61 N.J. 250 (1972)

State v. Kennedy, 135 N.J. Super. 513 (App. Div. 1975)

NOTES:

(1) State v. Kennedy, 135 N.J. Super. 513 (App. Div. 1975), upholds the common law rule that extrajudicial declarations of a defendant are admissible against him in a criminal proceeding (subject to other exclusionary rules such as those which exist to protect privileged statements and constitutional rights) notwithstanding the fact that the declaration was not against his penal or pecuniary interest when made. The court noted that the impression that "extrajudicial statements of a defendant in a criminal case are not admissible unless they qualify as declarations against interest under Evid. R. 63 (10)" is fallacious. Further, to hold such evidence inadmissible "would violate the spirit of the new rules of evidence, expressed in Evid. R.5 . . ."

(2) Note Rule 63 (7) as amended, effective July 1, 1976, applies to statements or admissions in criminal as well as civil actions. However, admissibility of statements by defendants in

criminal actions is subject to Rule 8(3) as amended, effective July 1, 1976, dealing with voir dire hearings on objections to such statements or admissions.

(3) State v. Hampton, 61 N.J. 250 (1972) holds that we return to the orthodox rule with respect to statements against the penal interest of a defendant, thus requiring the judge to decide the competency in the sense of satisfaction of Miranda requirements and the Fifth Amendment demand for voluntariness of the confession, while the jury after evaluating all the factual proof will decide its credibility if the statement is admitted into evidence by the judge.

(4) It is to be noted that Rule 8(3) of the Rules of Evidence still requires the judge's function to be handled out of the presence of the jury.

(5) The judge shall not inform the jury that he has made a preliminary finding of admissibility - Rule 8(3) of Evidence.

Approved: 9/1/76

4.281 STATEMENT BY DEFENDANT (WHERE ADMISSIBLE FOR CREDIBILITY PURPOSES ONLY)

We have in this case an oral/written statement (MARKED EXHIBIT _____) alleged to have been made by the defendant.

This statement has been introduced by the prosecution not as evidence of defendant's guilt of the crime charged, but to affect his credibility on condition that the jury first determine that the statement was made.

(HERE DISCUSS THE STATEMENT)

So you can see ladies and gentlemen of the jury, prior to your considering this statement for the limited purposes of affecting the defendant's credibility as a witness, you must determine whether the statement was actually given. In considering whether or not the statement was made by the defendant you may take into consideration the circumstances and facts surrounding the giving of the statement.

(HERE DISCUSS FACTS AND CIRCUMSTANCES SURROUNDING THE GIVING OF THE STATEMENT)

If you find that the statement was made it may be considered solely to determine the defendant's credibility if you believe it does, in fact, affect such credibility and not as evidence of his guilt. In this regard in all fairness you will want to consider all of the circumstances under which the claimed prior inconsistent statement occurred; the extent and importance or lack of importance of the inconsistency on the overall testimony of the

defendant as bearing on his/her credibility, including such factors as where and when the prior statement occurred and the reasons, if any, therefore.

If you find that the statement was not made then you must not consider it for any purpose. If you find that only part of the statement was made then you may only consider that part as it may affect defendant's credibility.

The extent to which defendant's credibility is affected by such inconsistencies, if any, is for you to determine. Consider the materiality and relationship of such contradictions to the entire testimony and all the evidence in the case.

Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)
State v. Kimbrough, 109 N.J. Super. 57 (App. Div. 1970)
State v. Hampton, 61 N.J. 250 (1972)
State v. Miller, 67 N.J. 229 (1975)
Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975).

NOTES:

(1) State v. Miller, 67 N.J. 229, 233 (1975) interpreting Harris, holds that:

"An in-custody statement taken from an accused by the police without first complying with the Miranda rule is not admissible in evidence as part of the State's main case. However, if it otherwise satisfies

standards of admissibility, it may be used to impeach the defendant's credibility as a witness should the defendant take the witness stand and give testimony which is at variance with what was said in the statement to the police. But the jury should be instructed as to the limited consideration it may give to the statement and its contents."

(2) See also Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975).

PRIOR CONTRADICTORY STATEMENTS OF WITNESSES (NOT PARTIES)*

Evidence, including the witness' statement or testimony prior to the trial, showing that at a prior time a witness has said something or has failed to say something which is inconsistent with the witness' testimony at the trial may be considered by you for the sole purpose of judging the witness' credibility. It may not be considered by you as substantive evidence or proof of the truth of any such prior contradictory statement or omitted statement.

It may be considered solely to determine the witness' credibility if you believe it does, in fact, affect such credibility. In this regard in all fairness you will want to consider all of the circumstances under which the claimed prior inconsistent statement or failure to disclose occurred; the extent and importance or lack of importance of the inconsistency on the overall testimony of the witness as bearing on his or her credibility, including such factors as where and when the prior statement or omission occurred and the reasons, if any, therefor.

In regard to the testimony of (witness' names) on cross-examination inconsistencies were shown (admitted) in the prior testimony or statements as compared with those given on the stand and matters told on the stand but not given before in any formal statement. The witness(es) gave reasons therefor, saying that many of such prior statements were untrue. Among the reasons given that I recall, were (list reasons: self

protection, exculpation, poor recollection at the time, things recently remembered and not, therefore, formerly disclosed, not believing a matter was important, etc.)

The extent to which such inconsistencies or omissions affect his credibility as a witness on the stand is for you to determine. Consider their materiality and relationship to his entire testimony and all the evidence in the case, when, where and the circumstances under which they were said or omitted and whether the reasons he gave you therefor appear to be to you believable and logical. In short, consider all that I have told you before about prior inconsistent statements or omissions.

You will, of course, consider other evidence and inferences from other evidence including statements of other witnesses or acts of the witness and others, disclosing other motives that the witness may have had to testify as he did, that is, reasons other than which he gave to us.

FOOTNOTES

PRIOR CONTRADICTORY STATEMENTS

State v. Lederman, 112 N.J.L. 366 (E. & A. 1933)

State v. Gallicchio, 44 N.J. 540, 548 (1965) (To neutralize statement of own witness)

State v. Guido, 40 N.J. 191, 200 (1963)

McCormick, Handbook on the Law of Evidence, 1954 §§ 22, 39, 59

Rule 20 - Evidence Generally Affecting Credibility

Rule 22 - Limitations on Admissibility of Evidence Affecting Credibility

Rule 63(1) - Previous Statements of Witnesses

Rule 63(3) - Depositions and Prior Testimony

Rule 63(7) - Admissions by Parties - not applicable to criminal cases and should not be confused with 63(10)

Rule 63(10) - Declarations against interest

Application of principles:

State v. Laws, 50 N.J. 159, 177 (1967)

State v. Hunt, 25 N.J. 514, 523-4 (1953) (Detectives' notes)

State v. Mayberry, et al, 52 N.J. 413, 424 (1968) (Use of prior statements for cross-examination at trial)

State v. Manchard, 31 N.J. 223, 228 (1959) (Contradictory statement by defendant)

See attached annotations.

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*If a party is the declarant of the prior contradictory statement, his statement may be used not only to affect credibility, but substantively as well. But this may not be the situation in criminal cases where the declarant is not the defendant. See Rules 63(7) (Civil only), 63(10) (civil and criminal). See particularly State v. Provoid, 110 N.J. Super. 547 (App. Div. 1970).

See also Rules of Evidence listed above.

ANNOTATION

PRIOR CONTRADICTORY STATEMENTS

State v. Lederman, 112 N. J. L. 366 (E. & A. 1933)

The defendant Fannie Lederman was convicted of second degree murder for the murder of her husband. The deceased was found dead in bed on Monday about 11:30 A. M., severely beaten about the head. The defendant at the same time was found on the floor of the kitchen, apparently unconscious. (From the medical and circumstantial evidence, the jury probably believed that this was feigned unconsciousness.) In addition to the wounds which caused the decedent's death, earlier injuries were found on the decedent consisting of bruises and lacerations.

The defendant testified that she had last seen her husband sitting in the kitchen smoking a cigarette; that she then proceeded to clean the bedrooms, when a masked man entered who hit her in the face. She remembered calling her husband before being hit, but nothing else until she found herself in the hospital.

Another witness for the defense was Victor Lederman, son of the defendant and the deceased. When the decedent went to sleep the night before the murder he had applied compresses to his face and used towels to protect the bedding. On direct examination, the witness testified that the compresses were applied because the decedent on the previous Friday morning had sustained injuries from an unknown assailant as he was

sleeping, that this attack was not reported to the police because the decedent did not wish to do so, and that the witness knew that his mother had not committed the assault.

The court held that a prior written statement by the witness saying that the deceased wished to report the assault to the police but was talked out of doing so by the witness and the defendant and that the witness had, on Friday morning received information from his brother (who shared a bed with the father), indicating that the defendant was the assailant, was properly admitted to impeach the defendant's allegations of innocence (p. 373) and to impeach the witness' testimony (p. 370).

State v. Laws, 50 N. J. 159, 177 (1967)

Earlier statements would not constitute substantive evidence but would serve to neutralize or impeach the effect of the conflicting testimony offered at trial.

PROCEDURE WHEN A PROPONENT KNOWS PRIOR TO TRIAL THAT A WITNESS WILL NOT ADHERE TO A PRIOR STATEMENT

State v. Guido, 40 N. J. 191, 200 (1963)

> When counsel has been advised a witness will not adhere to a prior statement but feels he should test that disavowal under oath, he should so inform the court at side bar. The witness should be examined in the absence of the jury. So much of his testimony as is not neutralized may then be repeated in its presence.

This procedure ensures that the jury will hear only testimony which is not neutralized as well as insuring that the jury won't be able to use the prior statement substantively.

PROCEDURE WHEN THE PROPONENT DOESN'T KNOW THAT A WITNESS WILL CONTRADICT HIS PRIOR STATEMENT

State v. Gallicchio, 44 N. J. 540, 548 (1965)

> Upon finding that the requisite elements are present (1) a contradictory statement, 2) surprise, 3) prejudice to proponent's case), the trial court shall permit the prior statement to be used, instructing the jury contemporaneously as to its effect. The jury should be instructed that they may consider the prior statement in deciding whether to believe the testimony which the prior statement contradicts. The trial court should strongly emphasize that in no ev ent is the jury to use the prior statement as proving the truth of the matter therein allegedly stated. Of course, at the conclusion of the case the jury should be instructed on this point.

Admission with a limiting instruction is normally the best available reconcilation of the respective interests. In extreme situations where the danger of misuse by the jury is high and its purpose for legitimate use is slight, the judge, of course, may exclude the evidence. McCormick, Evidence (1954) §59, Rule of Evidence 4.

The Rules of Evidence 20, 22, 4 recognize the countervailing values and incorporate the case law.

Rule 4 can be applied in any admissibility problem situation.

Rule 20 allows any extrinsic evidence relevant to credibility except that a proponent may not neutralize his witness' testimony unless he was surprised (see Gallicchio, supra).

Rule 22(B). Allows any extrinsic evidence of prior contradictory statements to be excluded unless the witness is given the opportunity to identify, explain or deny a statement.

State v. Gallicchio, 44 N. J. 540

Richard Nayduch, Jeffrey Alas and three others stopped at defendant's home in order that Nayduch repay the defendant a $15 debt. Nayduch went inside while the others waited outside. After waiting outside for twenty minutes Alas rang the bell and was about to enter the house when Gallicchio told Nayduch and the others to stay away so Gallicchio would avoid trouble with his wife. Nayduch told Alas, but Alas entered the apartment anyway. An argument and fight ensued in which Alas was injured.

Gallicchio was arrested for assault and battery and told police "what would you do if somebody were fooling around with your wife."

Alas died from hemorrhaging the next day. The charge against Gallicchio was changed to murder.

Nayduch testified at the trial that Alas punched Gallicchio and Nayduch joined in, on the side of Alas. Gallicchio pushed Alas to the floor and was defending himself against Nayduch. At this point Nayduch saw Alas going toward defendant with a knife.

The police had a prior contradictory statement of Nayduch saying that Gallicchio had the knife and that he saw Gallicchio's hand with a knife in it going toward Alas' body. The trial court accepted the state's claim of surprise and permitted the prior statement to neutralize the trial testimony which was adverse to the proponent's case.

The court instructed the jury four times as to the

4.282

effect of neutralization.

Approved: 9/1/76

4.320 WITNESS IMMUNITY

_____, a witness for the State, has testified that he has been granted immunity in return for his testimony.

What do we mean by immunity? Generally in any criminal proceeding before a court or Grand Jury a person may refuse to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby if there is a basis for his refusal. In New Jersey we have a law whereby under certain conditions the court may order the witness to testify, and the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. However, none of his testimony or any information derived directly or indirectly from his testimony which was compelled by the court order may be used against the witness in any criminal case, except, as with any other witness, a prosecution for perjury or for giving a false statement.

The fact that the witness has been granted immunity with respect to any testimony which might incriminate him is a factor which you should consider in evaluating his testimony and in determining the weight you will give to the testimony. The testimony of such a witness should be given careful scrutiny. In weighing his testimony, therefore, you may consider whether in order to obtain the immunity for himself, he is telling a

lie to you or whether, having been granted immunity, he is telling the truth.

If you believe this witness to be credible and worthy of belief, you have a right to accept his testimony in the same manner as any other witness' testimony.

It is important that you understand, however, that the immunity granted the witness is not immunity from prosecution, but simply immunity from the use of his testimony against him in a criminal proceeding. In other words, what he is saying in court or any information derived directly or indirectly from what he says in court may not be used against him in a criminal proceeding by the State, but the State is not precluded from prosecuting him for a crime on other evidence that is not derived directly or indirectly from his evidence given here in court.

N.J.S.A. 2A:81-17.3 as amended and eff. May 7, 1973. P.L. 1973, c.112.

NOTE:

Young v. Paterson, 132 N.J. Super. 170 (App. Div. 1975) holds that a Grand Jury witness, granted immunity pursuant to N.J.S.A. 2A:81-173, is not immunized in connection with a civil departmental hearing pertaining to or involving the offense which was the subject matter of his grand jury testimony.

In re Addonizio, 53 N.J. 107 (1968)

State v. Sotteriou, 123 N.J. Super. 434 (App. Div. 1973)

Approved: 9/1/76

4.322 TAMPERING WITH OR DAMAGING MOTOR VEHICLES N.J.S.A. 2A:127-5

The indictment also charges defendant(s) with willfully and maliciously damaging a motor vehicle.

The statute or law involved here is N.J.S.A. 2A:127-5, which in pertinent part reads as follows: "Any person who willfully and maliciously tampers with, breaks, cuts, damages or makes improper or faulty adjustment to the motor, mechanism, brakes, tires, or any part or parts of any motor vehicle with the intent to cause the operation of such motor vehicle to be unsafe and dangerous to the lives of others, is guilty of a ... [crime]."

In order to convict defendant(s) of a violation of this criminal statute, the State must prove each of the following elements beyond a reasonable doubt:

1) that the defendant(s) in this case willfully and maliciously tampered with, broke, etc. (use appropriate alleged violation of the statute) of a motor vehicle; and,

2) that the defendant(s) in this case by his (their) act or acts intended to cause the operation of such motor vehicle to be unsafe and dangerous to the lives of others.

N.B. - I do not feel it necessary for me to describe what a motor vehicle or automobile is. It is conceded in this case that the object in question is in fact a motor vehicle as referred to in the statute which I have just cited.

In reference to the meaning of the words "willfully" and "maliciously" as used in the first element to be proved by the State beyond a reasonable doubt; "willfully" means voluntarily or knowingly with evil intent or without reasonable grounds for believing the act to be lawful, while "maliciously" means wrongfully, intentionally and without just cause or excuse.

In reference to the meaning of the word intent or intentionally as used in the first and second elements to be likewise proved by the State beyond a reasonable doubt;

Whereas an act becomes criminal by reason of the intent with which it is committed, such intention must exist concurrent with the act and must be proved. To find intent is to determine the content and thought of the defendant's mind on that occasion.

In addition, the State of course must prove beyond a reasonable doubt that defendant(s) by his (their) acts intended (within the definition of intent as I have previously explained it to you) to cause the operation of the motor vehicle in question to be unsafe and dangerous to the lives of others.

See Schlosser, Criminal Laws of N. J., Vol. 2, section 70.[illegible].

Approved: 1/31/77

4.324 DISMISSAL OF JURY*

Ladies and gentlemen of the jury, as you now must realize, the function which you have performed is the most important task which you will ever be called upon to fulfill. With the return of your verdict, your service in this case is complete.

The key to your function has been the free discussion among yourselves during your deliberations. It is essential to the continuation of the fair administration of justice that those discussions remain solely within your minds.

Upon your discharge you are not required, except upon Order of this Court, to discuss your deliberations or verdict with anyone. Additionally, no person connected with this trial is permitted, under the Rules of Court, to engage you in conversation about this matter or your role in its outcome.

All jurors have a right to expect that their communications with their fellow jurors during deliberations will remain confidential. (It is in the public interest that there be the utmost freedom of discussion in the jury room and that each juror be permitted to express his views without fear of incurring public scorn or the anger of any of the litigants.)

Under no circumstances should you make a statement which you would not be willing to repeat under oath in open court in the presence of your fellow jurors.

*In addition to giving this charge upon dismissal of the jury, a judge may wish to give the charge at the beginning of the case as well.

CITATIONS

U.S. v. Franks, 511 F. 2d 25 (6th Cir 1975), cert. denied, 422 U.S. 1042 (1975)

Miller v. U.S., 403 F. 2d 77 (2nd Cir. 1968), modified on other grounds, 411 F. 2d 825 (2nd Cir. 1968)

Bryson v. U.S., 238 F. 2d 657 (9th Cir. 1956), cert. denied, 355 U.S. 817 (1957)

State v. Athorn, 46 N.J. 247 (1966)

State v. LaFera, 42 N.J. 97 (1964)