

MANUFACTURING OF BURGLAR'S TOOLS
(N.J.S.A. 2C:5-5a)

[Count _____ of] [T]he indictment charges defendant with manufacturing of burglar's tools. That section of our statutes provides that:

Any person who manufacturers . . . any engine, machine, tool or implement adapted, designed, or commonly used for committing or facilitating the offense of _____,¹ knowing the same to be so adapted, designed, or commonly used, [with the purpose to use or employ it] [OR with a purpose to provide it to some person whom he knows has such a purpose to use or employ it], is guilty of an offense.

In order for defendant to be found guilty of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. that the defendant manufactured an engine, machine, tool or implement adapted, designed, or commonly used for committing or facilitating the offense of _____;
2. that he/she knew the engine, machine, tool or implement was adapted or designed or commonly used for committing or facilitating that offense; and
3. that his/her purpose was [to use or employ it] [OR to provide it to some other person whom he/she knew had the purpose to use or employ it] to commit or facilitate that offense.²

The first element that the State must prove beyond a reasonable doubt is that defendant manufactured an engine, machine, tool or implement adapted, designed, or commonly used for committing or facilitating the offense of _____, in this case [identity by name, type, or exhibit number].

The engine, machine, tool or implement that defendant is charged with manufacturing must be specially or specifically designed or adapted or commonly used for commission or

¹ Specify here, and at every other relevant point in the charge, the "offense in chapter 20 of this Title or offenses involving forcible entry into premises" that defendant is charged with manufacturing the burglar's tool adapted, designed, or commonly used for committing or facilitating.

² State v. Gertrude, 309 N.J. Super. 354, 358 (App. Div. 1998).

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facilitation of this offense and not merely be something designed or adapted or commonly used for some other purpose that can be or is used for committing or facilitating this offense.³

The elements of the offense of _____ are [see appropriate **Model Jury Charge**] **OR [I have already defined for you (OR I will define for you)** the elements of the offense of _____ in the instructions regarding count ____ of the indictment].

The second element that the State must prove beyond a reasonable doubt is that defendant knew that the engine, machine, tool, or implement was designed, adapted, or commonly used for committing or facilitating the offense of _____. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result.

The third element that the State must prove beyond a reasonable doubt is that defendant's purpose was to use or employ the engine, machine, tool or implement [**OR to provide the engine, machine, tool or implement to another whom he/she knows has the purpose to use or employ it**] for committing or facilitating the offense of _____. A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts "purposely" with respect to attendant circumstances if he/she is aware of the existence of such circumstances or he/she believes or hopes that they exist.

**[IF DEFENDANT IS ACCUSED OF PROVIDING IMPLEMENT TO ANOTHER:
I have already defined the term "knowing" for you].**

Purpose and knowledge are conditions of the mind that cannot be seen and that can be determined only by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been

³ See Cannel, Criminal Code Annotated, Comments 2. (second paragraph) and 4. to N.J.S.A. 2C:5-5 ("[T]he linkage of the manufacture of implements with the publishing of plans suggests that the higher penalty was intended for those persons who produce a specialized implement. Such persons pose a greater danger to the public").

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furnished beyond a reasonable doubt by inference, which may arise from the nature of defendant's acts and conduct, from all that he/she said and did at the particular time and place, and from all surrounding circumstances.

If the State has failed to prove each element of this offense beyond a reasonable doubt, then you must find the defendant not guilty. If the State has proven each element of this offense beyond a reasonable doubt, then you must find defendant guilty.

CHARGE IF APPROPRIATE:

POSSESSION OF BURGLAR'S TOOLS (lesser included offense)

As part of his/her denial of guilt to the charge of manufacturing burglar's tools, defendant asserts that he/she did not manufacture _____, but merely possessed it without having any role or part in its manufacture. It is the State's burden to prove beyond a reasonable doubt that defendant manufactured rather than merely possessed the engine, machine, tool or implement.

The word "possess" as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character.

Thus, the person must know or be aware that he/she possesses the item (in this case _____), and he/she must know what it is that he/she possesses or controls (that it is (they are) burglar's tool(s)).

[Where applicable charge the following: this possession cannot merely be a passing control that is fleeting or uncertain in its nature]. In other words, to "possess" within the meaning of the law, the defendant must knowingly procure or receive the item possessed or be aware of his/her control thereof for a sufficient period of time to have been able to relinquish his/her control if he/she chose to do so. (Define "knowing" N.J.S.A. 2C:2-2 and any other definition relevant to the item allegedly possessed).

A person may possess _____ (an item) even though it was not physically on his/her person at the time of the arrest, if he/she had in fact, at some time prior to his/her arrest, had control over it.

When we speak of possession, we mean a conscious, knowing possession. The law recognizes two kinds of possession: they are actual possession and constructive possession.

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ACTUAL POSSESSION

A person is in actual possession of a particular article or thing when he/she knows what it is: that is, he/she has knowledge of its character and knowingly has it on his/her person at a given time.

CONSTRUCTIVE POSSESSION

The law recognizes that possession may be constructive instead of actual.

Constructive possession means possession in which the person does not physically have the property, but though not physically on one's person, he/she is aware of the presence of the property and is able to and has the intention to exercise control over it.

A person who, although not in actual possession, has 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.

If the State has failed to prove each element of the offense beyond a reasonable doubt, then you must find the defendant not guilty. If the State has proven each element of the offense beyond a reasonable doubt, then you must find defendant guilty of manufacturing burglar's tools. If the State has not proven beyond a reasonable doubt that defendant manufactured rather than possessed the engine, machine, tool or implement, but has proven all of the other elements beyond a reasonable doubt, then you must find the defendant guilty of possession of burglar's tools.