

MISAPPLICATION OF ENTRUSTED PROPERTY
(FIDUCIARY DUTY)
(N.J.S.A. 2C:21-15)

Count(s) _____ charge(s) defendant with Misapplication of Entrusted Property.

[READ COUNT OF INDICTMENT]

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

A person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary * * * in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted whether or not the actor has derived a pecuniary benefit.

The State must prove the following five elements of the crime beyond a reasonable doubt:

1. Defendant knowingly¹ applied or disposed of property;
2. The property at issue was entrusted to defendant as a fiduciary;
3. Defendant's application or disposition of the property was unlawful;
4. Defendant's application or disposition involved substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted;
5. Defendant knew that his/her conduct was unlawful; and
6. Defendant knew that his/her conduct involved a substantial risk of loss or detriment to the owner of the property or to the person for whose benefit the property was entrusted.

¹ Matter of Iulo, 115 N.J. 498, 502 (1989); State v. Manthey, 295 N.J. Super. 26, 30-31 (App. Div. 1996); N.J.S.A. 2C:2-2c(3).

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The first element the State must prove beyond a reasonable doubt is that defendant knowingly applied or disposed of property. Here the State asserts that the property was [describe property].

The term “property” means anything of value,² even though it may be impossible to identify particular property as belonging to the victim at the time defendant allegedly misapplied the property because the victim’s property may have been mixed with or joined with other property.

Defendant must have applied or disposed of the property knowingly. A person acts knowingly as 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. One acts knowingly as to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. One acts knowingly if one acts with knowledge, if one acts consciously, if one comprehends his/her acts.

Knowledge is a condition of the mind. It 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 furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and his/her conduct, and from all he/she said and did at the particular time and place, and from all the surrounding circumstances.

² N.J.S.A. 2C:20-1g. The statutory definition gives examples of various types of property as being included in the definition, such as trade secrets and choses in action. Reference should be made to the statutory definition in particular cases to determine whether additional language should be charged.

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The second element the State must prove beyond a reasonable doubt is that the property at issue was entrusted to defendant as a fiduciary. A fiduciary includes a trustee, guardian, executor, administrator, receiver, and any person carrying on fiduciary functions on behalf of a corporation or other organization which is itself a fiduciary.³

A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care.⁴

**[CHARGE WHERE DEFENDANT'S FIDUCIARY DUTY OF CARE
DOES NOT DERIVE FROM DEFENDANT'S PROFESSION]**

The third element that the State must prove beyond a reasonable doubt is that defendant's application or disposition of the property was unlawful, that is, he/she applied or disposed of the property in a manner contrary to his/her responsibility as a fiduciary.

In this case, the State asserts that defendant's responsibility was: [describe specific obligations arising from fiduciary duty.⁵]

As I have already explained, the State bears the burden of proving defendant guilty beyond a reasonable doubt as to each and every element of the crime. The State's burden is not reduced or shifted to defendant because he/she may have violated a fiduciary duty. The fiduciary duty of care is relevant to determining defendant's state of mind, because it may have placed

³ N.J.S.A. 2C:25-15.

⁴ F.G. v. MacDonell, 150 N.J. 550, 563-564 (1997).

⁵ Fiduciary duties may be based upon statutory or common law and vary depending on the industry and relationship at issue. See e.g., N.J.S.A. 3B:1-6 et seq. (administration of estates); N.J.S.A. 3B:11-4.1 (defining fiduciary duties in the setting of trusts); N.J.S.A. 3B:20-11.2 (Prudent Investor Act); N.J.S.A. 42:1A-24 (Fiduciary Duties of Partners); N.J.S.A. 46:2B-8.13 (attorney-in-fact); F.G. v. MacDonell, 150 N.J. 550, 564-65 (1997) (fiduciary duty owed to parishioner by clergyman acting as counselor). The particular fiduciary duties owed in a given legal setting must be determined by the judge as a matter of law during the charge conference. R. 1:8-7.

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defendant on notice as to what was expected of him/her when he/she became the custodian of the property.

A violation of a fiduciary duty, in and of itself, is insufficient, as a matter of law, to sustain a finding of criminal culpability. However, together with any other evidence in the case, you may consider defendant's breach of his/her fiduciary duty as evidence of defendant's state of mind. The more egregious the violation, the more likely defendant acted knowingly. For example, an extended pattern of conduct, displaying an utter disregard for his/her fiduciary duty would have more probative value than an isolated incident of bad recordkeeping or accounting.⁶

OR

**[CHARGE WHERE DEFENDANT'S DUTY IS ESTABLISHED
BY REFERENCE TO AN ETHICAL RULE, OR
A PROFESSIONAL PRINCIPLE, RULE, OR STANDARD]**

The third element that the State must prove beyond a reasonable doubt is that defendant's application or disposition of the property was unlawful, that is, he/she applied or disposed of the property in a manner contrary to the regulations and laws defining his/her duty as a [specify position or profession]. In this case, the State asserts that defendant's responsibility was [describe source of duty].

As I have already explained, the State bears the burden of proving defendant guilty beyond a reasonable doubt as to each and every element of the crime. The State's burden is not reduced or shifted to defendant because he/she may have violated a/an (ethical rule) (professional principle) (professional rule) and/or (professional standard). The standards of (recordkeeping) (accounting practices) delineated in the (ethical rule) (professional principle)

⁶ See generally State v. Mahoney, 188 N.J. 359, 379 (2006), cert. denied, 549 U.S. 995, 127 S. Ct. 507, 166 L. Ed. 2d 368 (2006).

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(professional rule) and/or (professional standard) are relevant to determining defendant's state of mind, because they placed defendant on notice as to what was expected of him/her when he/she became the custodian of the property.

A violation of a/an (ethical rule) (professional principle) (professional rule) (professional standard), in and of itself, is insufficient, as a matter of law, to sustain a finding of criminal culpability. However, together with any other evidence in the case, you may consider a violation of the (ethical rule) (professional principle) (professional rule) (professional standard) as evidence of defendant's state of mind. The more egregious the violation, the more likely defendant acted knowingly. For example, an extended pattern of conduct, displaying an utter disregard for his/her fiduciary duty would have more probative value than an isolated incident of bad recordkeeping or accounting.⁷

[RESUME CHARGE IN ALL CASES]

Fourth, the State must prove beyond a reasonable doubt that defendant's application or disposition of the property involved substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.

Fifth, the State must prove beyond a reasonable doubt that defendant knew that his/her conduct was unlawful. I have already defined knowingly for you.

Sixth, the State must prove beyond a reasonable doubt that defendant knew that his/her application or disposition of the property involved a substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted. A substantial

⁷ The preceding two paragraphs describing the significance to be attributed to professional standards, regulations, and duties is required by State v. Mahoney, 188 N.J. 359, 379 (2006), cert. denied, 549 U.S. 995, 127 S. Ct. 507, 166 L. Ed. 2d 368 (2006), in which the Court addressed an attorney's violation of R.P.C. 1:21-6.

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risk is one that is of such a nature and degree that, considering the nature and purpose of defendant's conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in defendant's situation. In other words, the State must prove beyond a reasonable doubt that defendant knew that it was very likely that his/her treatment of the property would create a risk of loss or detriment to the owner or person for whose benefit the property was entrusted, and that defendant went ahead anyway, where a reasonable person would not. I have already defined knowing for you. It is not necessary for the State to prove that defendant himself/herself derived a benefit during his/her application or disposition of the property.⁸

If the State has proven each of the six elements of this crime beyond a reasonable doubt, then you must find defendant guilty of misapplication of entrusted property. On the other hand, if the State has failed to prove any element beyond a reasonable doubt, you must find him/her not guilty. If you find defendant not guilty, your consideration of the misapplication of entrusted property charge should end here.

However, if you find defendant guilty beyond a reasonable doubt, you must then proceed to make two additional factual findings. Specifically, you must indicate whether defendant derived a benefit from his misapplication of entrusted property, and, if so, the benefit he/she derived.

First, you must determine whether the State has proven beyond a reasonable doubt that defendant derived a benefit as a result of his/her misapplication of entrusted property. Benefit

⁸ If defendant derived no pecuniary benefit from his misapplication, he is guilty of a fourth-degree crime under this section. See Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:21-15 (2008); American Law Institute, Model Penal Code and Commentaries, § 224.13, comments 1 and 3 at pp. 358-60, 363 (1980) (distinguishing this crime from embezzlement and theft).

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means a gain or advantage, or anything regarded by the beneficiary as a gain or advantage, including but not limited to a pecuniary benefit or a benefit to any person or entity in whose welfare he/she is interested. Please indicate whether the State has proven that defendant derived a benefit from the alleged misapplication beyond a reasonable doubt by marking “yes” or “no” on your verdict sheet.

If you have both determined that defendant is guilty of misapplication of entrusted property, and indicated that “yes,” that defendant did derive a pecuniary benefit from the misapplication, then you must go on to determine the amount of that pecuniary benefit. Specifically, you should indicate on the verdict sheet if the benefit that defendant derived has a value that:

[CHOOSE APPROPRIATE SECTIONS]

- (1) is \$75,000.00 or more;
- (2) exceeds \$1,000.00, but is less than \$75,000.00;
- (3) is \$1,000.00 or less.

The “benefit derived” includes the value of all funds or property misapplied by defendant.⁹ That is, the value of the property misapplied is not simply the value of its use during the period in which defendant exercised control over the property. For example, if a defendant applies or disposes of \$5,000, but later reimburses the victim, the value of the “benefit derived” is the full \$5,000. It is not merely the amount of interest that a bank might have charged for the use of a \$5,000 loan during the period in which defendant made use of the money. Similarly, if a defendant applies or disposes of \$5,000, but reimburses the victim for all but \$200 of the

⁹ State v. Modell, 260 N.J. Super. 227, 250-51 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993); see also State v. Cetnar, 341 N.J. Super. 257, 263-64 (App. Div.), certif. denied, 170 N.J. 89 (2001).

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amount, the benefit derived is still \$5,000, the entire amount involved. In calculating the “benefit derived,” you must include but are not limited to, the amount of any tax avoided, evaded, unpaid, improperly retained, or improperly disposed of.

**[CHARGE WHEN PROPERTY AT ISSUE IS
SOMETHING OTHER THAN MONEY]**

In this case, the State alleges that the benefit derived was something other than money. You must determine the value of that benefit. Value means the fair market value of the property at the time and place of the alleged misapplication.¹⁰ Fair market value is the price that a buyer would be willing to pay and a seller would be willing to accept if both parties were aware of all the relevant surrounding circumstances and neither party were under any compulsion to buy or sell.

Here, the State has provided you with evidence of the value of the property by [describe testimony or other evidence used to establish value]. The State has the burden of proving the fair market value of the property involved. This means that you must be satisfied beyond a reasonable doubt that the property is worth what the State claims.

¹⁰ N.J.S.A. 2C:1-14m.