

POSSESSION OF PROHIBITED WEAPONS AND DEVICES
(Dum-dum, hollow nose bullets or body armor penetrating bullets)¹
(N.J.S.A. 2C:39-3f)

Count _____ of the indictment charges the defendant as follows:

(Read Indictment)

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

Except as authorized by statute, it shall be unlawful for any person knowingly to possess any (hollow nose or dum-dum bullet) [or] (body armor breaching or penetrating ammunition).

The statute, read together with the indictment, identifies the elements which the State must prove beyond a reasonable doubt to establish guilt of the defendant on this (count of the) indictment. They are as follows:

In order to convict defendant of this offense, you must be satisfied that the State has proved each of the following two elements beyond a reasonable doubt:

1. That Exhibit S-____ is (a hollow nose or dum-dum bullet)[or](body armor breaching or penetrating ammunition).
2. That defendant knowingly possessed Exhibit S-____ (the alleged ammunition).

(CHARGE AS APPLICABLE)

In regard to the first element that the State must prove beyond a reasonable doubt, a “hollow nose bullet or dum-dum bullet” can be a cartridge of any caliber in which the front portion of the projectile is designed to expand upon entering a target. The jacket metal does not cover the entire bullet and an area near the nose is left uncovered. There is a pit or hollow

¹ The statute contains certain exemptions including: (1) a law enforcement officer or persons engaged in activities pursuant to subsection f. of N.J.S.A. 2C:39-6 who has in his possession any hollow nose or dum-dum bullet; or (2) a collector of firearms or ammunition as curios or relics as defined in Title 18, United States Code, section 921(a)(13), and who has in his possession a valid Collector of Curios and Relics License issued by the Bureau of Alcohol, Tobacco and Firearms, who possesses body armor breaching or penetrating ammunition. A collector may possess not more than three examples of each distinctive variation of body armor breaching or penetrating ammunition. There are also exemptions found in N.J.S.A. 2C:39-3(g)(1), (g)(2), and (g)(3). If those defenses are raised, the jury should be instructed that the State bears the burden to disprove beyond a reasonable doubt the existence of any statutory exemption.

POSSESSION OF PROHIBITED WEAPONS AND DEVICES
(Dum-dum, hollow nose bullets or body armor penetrating bullets)
N.J.S.A. 2C:39-3f

present in the front of the nose.²

[or]

In regard to the first element that the State must prove beyond a reasonable doubt, body armor penetrating bullets means (a) ammunition primarily designed for use in a handgun, and (b) which is comprised of a bullet whose core or jacket, if the jacket is thicker than .025 of an inch, is made of tungsten carbide, or hard bronze, or other material which is harder than a rating of 72 or greater on the Rockwell B. Hardness Scale, and (c) is therefore capable of breaching or penetrating body armor. Body armor is bullet-resistant material intended to provide ballistic and trauma protection.³

(RESUME MAIN CHARGE)

The second element that the State must prove beyond a reasonable doubt is that the defendant knowingly possessed S _____ in evidence.⁴ The word “possess” as used in criminal statutes signifies a knowing, intentional control of a designated thing, accompanied by a knowledge of its character.

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he/she is aware that it is practically certain that the conduct will cause a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inference from defendant’s 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 did a particular thing. It is within your power to find that such proof has been furnished

² People v. Lanham, 230 Cal. App. 3d 1396, 1399, 282 Cal. Rptr. 62 (Cal. Ct. of Appeal 1991) for expert testimony on the definition of hollow nose bullets.

³ N.J.S.A. 2C:39-13.

⁴ If in a motor vehicle, see N.J.S.A. 2C:39-2. Use “inference” instead of “presumption”. State v. Ingram, 98 N.J. 489 (1985); State v. Bolton, 230 N.J. Super. 476, 480 (App. Div. 1989). Comment 2 N.J.R.E. 301 and 303.

POSSESSION OF PROHIBITED WEAPONS AND DEVICES
(Dum-dum, hollow nose bullets or body armor penetrating bullets)
N.J.S.A. 2C:39-3f

beyond a reasonable doubt by inference which may arise from the nature of his/her acts and conduct and from all he/she said and did at the particular time and place and from all surrounding circumstances established by the evidence.

Thus, [defendant] must know or be aware that he/she possessed the item, here the items alleged to be ammunition. The State [is] not required to prove that, at the time that he/she knowingly possessed the ammunition, defendant also knew that it was (hollow nose or dum-dum bullet(s))[or](body armor breaching or penetrating ammunition).⁵

Defendant's 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.

When we speak of possession, we mean a conscious, knowing possession. The law recognizes two kinds of possession: actual possession and constructive 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. 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 person does not physically have the property, but 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.

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 proven each element of this crime beyond a reasonable doubt, then you

⁵ State v. Smith, 197 N.J. 325, 338 (2009).

POSSESSION OF PROHIBITED WEAPONS AND DEVICES
(Dum-dum, hollow nose bullets or body armor penetrating bullets)
N.J.S.A. 2C:39-3f

must find defendant guilty. On the other hand, if the State has failed to prove any element beyond a reasonable doubt, you must find him/her not guilty.

To reiterate, the two elements of this offense are that:

1. S_____ in evidence is (a hollow nose or dum-dum bullet)[or](body armor breaching or penetrating ammunition).
2. The defendant knowingly possessed S_____ in evidence.

If you find that the State had proven all these elements beyond a reasonable doubt, then you must return a verdict of guilty. On the other hand, if you find that the State has failed to prove any of these elements beyond a reasonable doubt, then you must return a verdict of not guilty.