

PERSISTENT OFFENDER

Your service is not complete. There is an additional question for you to consider.

It is alleged,

(Read Persistent Offender Grand Jury Presentment)¹

Your prior verdict should not influence your decision on this question. The fact that you have found the defendant guilty of (a) crime(s) in the indictment, does not mean that defendant is a Persistent Offender as our law defines it. You must consider the evidence presented on this question independent of your prior verdict.

A “Persistent Offender” is defined by a statute² as,

[A] person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

The use of the term “Persistent Offender” should in no way influence your determination. It is presumed that the defendant does not qualify as a Persistent Offender. In order to establish that the defendant is subject to this statute, the State must prove each of the following elements³ beyond a reasonable doubt:

1. Defendant was at least twenty-one years of age or older when he committed the crime of **[crime of conviction for which the State is seeking an extended term]**;
2. Defendant was previously convicted of at least two prior crimes;
3. Those convictions occurred on two separate occasions;
4. Those prior crimes were committed at different times;

¹ In Erlinger v. United States, 602 U.S. 821 (2024), the United States Supreme Court held that enhanced sentencing based upon a finding that prior crimes were committed “on separate occasions” required jury fact-finding. State v. Carlton, 480 N.J. Super. 311 (App. Div. December 19, 2024) held that Erlinger applies to New Jersey’s Persistent Offender statute, N.J.S.A. 2C:44-3a. Additionally, prospectively, such an allegation must also be presented to a grand jury prior to trial.

² N.J.S.A. 2C:44-3a.

³ All of the elements of the Persistent Offender statute require jury fact-finding, not merely whether the prior crimes occurred on separate occasions. Carlton, 480 N.J. Super. at 328-29.

5. Defendant was at least 18 years of age when he committed⁴ those prior crimes; and
6. The latest in time of those prior crimes [or the date of his last release from confinement, whichever is later] was within ten years of the date on which defendant committed the crime of [**crime of conviction for which the State is seeking an extended term**];

Normally, evidence of a defendant's prior crimes is not permitted under our rules of evidence. This is because our rules specifically exclude evidence that a defendant has committed prior crimes when it is offered only to show that he has a disposition or tendency to do wrong and therefore must be guilty of the present offense. However, our rules do permit evidence of prior crimes when the evidence is used for some other purpose.

In this case, the evidence has been introduced for the specific purpose of establishing whether or not the defendant is a persistent offender. You may not use this evidence to decide that the defendant has a tendency to commit crimes or that (he/she) is a bad person. In other words, you may not answer the question affirmatively simply because you learn the defendant may have committed crimes on prior occasions. The evidence produced by the State concerning prior crimes is only to be considered in determining whether the State has established beyond a reasonable doubt the specific elements of the question presented to you.

The first element the State must prove beyond a reasonable doubt is that defendant was twenty-one years of age or older when he committed the crime(s) of [**crime of conviction for which the State is seeking an extended term**].

The second element the State must prove beyond a reasonable doubt is that defendant has previously been⁵ convicted of at least two prior crimes.

A "crime" in the State of New Jersey is an offense for which a sentence of imprisonment in excess of six months is authorized, even if such a sentence is not imposed. Crimes are designated as being of the first, second, third or fourth degree.⁶ If the offense is alleged to have been committed in another State or jurisdiction, a "crime" is an offense for which a sentence of

⁴ Crimes committed when the defendant was a juvenile are not to be considered, even if the defendant was waived to adult court. Carlton, 480 N.J. Super. at 328.

⁵ The jury can consider crimes committed chronologically after the crime that was the subject of present matter, as long as the convictions were entered prior to the conviction in the present matter. State v. Cook, 330 N.J. Super. 395 (App. Div. 2000).

⁶ N.J.S.A. 2C:1-4a.

imprisonment in excess of one year⁷ is authorized, even if such a sentence is not imposed.

A person has been “convicted of” of a crime if a judgment of conviction has been entered by a court of competent jurisdiction in this State, another State, or any federal district.

The third element the State must prove beyond a reasonable doubt is that at least two prior convictions occurred at different times. This element concerns the dates the judgments were entered by the court, rather than the dates the offenses were committed. The State must prove beyond a reasonable doubt that at least two of those judgments of convictions were entered at different times. The convictions must be the same convictions the State has offered to establish the second element.

The fourth element the State must prove beyond a reasonable doubt is that those prior crimes were committed at different times. This element concerns the dates of the commission of those crimes, rather than the dates of the convictions. The State must prove beyond a reasonable doubt that at least two of those crimes were committed at different times. The crimes must be the same crimes the State has offered to establish the second and third elements.

[Charge if the defendant stipulates to the prior offenses]

In this matter, the parties have stipulated, or agreed, that the defendant has previously been convicted of **[list crimes the parties have agreed on, including dates of commission and dates of conviction]**. You should treat these facts as being undisputed, that is, the parties agree that these facts are true. As with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict.

[CHARGE IN ALL CASES]

The fifth element the State must prove beyond a reasonable doubt is that defendant was at least 18 years of age when defendant committed each of those prior crimes. The crimes must be the same crimes the State has offered to establish the second, third, and fourth elements.

The sixth element the State must prove beyond a reasonable doubt is that the latest in time of the commission⁸ of the prior crimes **[choose if applicable: or the date of his last release from confinement, whichever is later]** was within ten years of the commission of (the counts of conviction in the matter before the court).

⁷ N.J.S.A. 2C:1-4b.

⁸ This element concerns the dates of the commission of those crimes, rather than the dates of the convictions. State v. Clarity, 454 N.J. Super. 603, 608-09 (App. Div. 2018).

If you find that the State has proven beyond a reasonable doubt each of these elements, then you must answer “yes” to the question presented. If you find that the State has failed to prove any one of these elements beyond a reasonable doubt, then you must answer “no” to the question presented.