

Theft From Interstate Shipment (18 U.S.C. §659)

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6.18.659A Theft from Interstate Shipment (18 U.S.C. § 659) (First Paragraph)

Count *(number)* of the indictment charges the defendant *(name)* with *(briefly state offense; e.g., theft from interstate shipment)*, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That *(name)* [*(stole)* *(embezzled)* *(unlawfully took)* *(carried away)* *(concealed)* *obtained through fraud or deception*)] **the property described in the indictment from** *(specify location set forth in statute, e.g., a railroad car)* **as alleged in the indictment;**

Second: That at that time this property was *(moving as)* *(was a part of)* **an interstate** *(a foreign)* **shipment of freight;**

Third: That *(name)* **knew the property was not** *(his)**(hers)* **and had the intent to permanently deprive the owner of the use and benefit of the property; and**

Fourth: That the property then had a value of \$1,000 or more.

[The word “value” means (use appropriate language: the face, par, or market value, or cost price, either wholesale or retail, whichever is greater).]

[Use the following language where appropriate:

To “embezzle” means to wrongfully, intentionally take property of another after the property has lawfully come within the possession or control of the person taking it.

To “steal” means to wrongfully take money or property, belonging to another with intent to permanently deprive the owner of its use or benefit. Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is actual removal of it from the owner's premises.]

“An interstate (a foreign) shipment” means goods or property which are in the process of being shipped from one state (country) to another.

The interstate (or foreign) character of a shipment begins when the goods or property are (is) first identified and set aside for the shipment from one state (country) to another; and the interstate (or foreign) character of the shipment continues until the shipment arrives at its final destination and is there delivered.

While the government must prove the interstate (or foreign) character of the shipment, the government is not required to prove that (name) knew that the goods were a part of such a shipment at the time of the alleged [(theft) (embezzlement) (unlawfully taking) (carrying away) (concealing through fraud or deception)].

Comment

Fifth Circuit § 2.36.

The first paragraph of 18 U.S.C. § 659 provides:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, trailer, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from

any aircraft, air cargo container, air terminal, airport, aircraft terminal or air navigation facility, or from any intermodal container, trailer, container freight station, warehouse, or freight consolidation facility, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property

commits a federal offense. 18 U.S.C. § 659 further provides that the sentence for a violation is a fine and/or up to 10 years in prison if the value of the property is \$1,000 or more.

The first element is that the defendant stole, embezzled, unlawfully took, carried away, concealed, or obtained through fraud or deception the property alleged from a location that satisfies the requirements of the statute. In *United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956), the Third Circuit reversed a conviction under Section 659 holding that “[u]nder ... (18 U.S.C.A. Section 659), it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned.” See also *United States v. Allegrucci*, 258 F.2d 70, 75 (3d Cir. 1958) (faulting the district court for failing to follow the mandate of *Manuszak* and instruct the jury that it must determine that the stolen goods were taken from a platform, a place specified in the statute). The instruction reflects this requirement.

The second element is that the property was moving as or was a part of an interstate or foreign shipment. See *United States v. Garber*, 626 F.2d 1144, 1147 (3d Cir. 1980). In *Garber*, the Third Circuit explained that literal movement is not required and suggested that each case must be decided based on a common sense assessment of a variety of factors, including “the indicia of interstate or foreign commerce at the time of the theft,” whether the property has been delivered to a carrier, and the physical location of the property at the time of the theft. 626 F.2d at 1147. See also *United States v. Kapp*, 781 F.2d 1008, 1011 (3d Cir. 1986). An interstate shipment is in interstate commerce until it reaches its ultimate destination. 626 F.2d at 1147-48. If jurisdiction rests on movement in foreign commerce, the government does not need to show interstate movement in addition to movement from a foreign country to the United States. 626 F.2d at 1148 n.3.

The third element is that the defendant knew the property was not his/hers and had the intent to permanently deprive the owner of the use and benefit of the property. In *United States v. Kemble*, 197 F.2d 316, 321 (3d Cir. 1952), the Third Circuit held that the trial court’s instruction on intent was error. The court noted that “[i]n *United States v. Cohen*, 3 Cir., 274 F. 596, 597 this court defined the statutory offense of stealing an interstate shipment to be the ‘unlawful taking and carrying away with intent to covert to the use of the taker and permanently deprive the owner.’” The court also quoted the Supreme Court’s statement in *Morissette v.*

United States, 342 U.S. 246, 271 (1952), that “[p]robably every stealing is a conversion, but certainly not every knowing conversion is a stealing.” In *Kemler*, the Third Circuit held that the trial court’s instruction was plain error because “the jury should have been required to find that [the defendant] possessed a specific intent to steal the whiskey.” 197 F.2d at 322. Other circuits have held that intent permanently to deprive is not required. See, e.g., *United States v. Cook*, 967 F.2d 431 (10th Cir. 1992); *United States v. Waronek*, 582 F.2d 1158 (7th Cir. 1978). However, the Third Circuit has never overruled *Kemler*.

The fourth element is value of \$1000 or more. In *United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987), the Third Circuit held that “the value of the goods stolen is a necessary element for conviction of a felony under 18 U.S.C. § 659” or under a 18 U.S.C. § 371 conspiracy to violate § 659. If the government establishes all the elements except for the fourth, the defendant is guilty of a misdemeanor. *Scanzello*, 832 F.2d at 23.

In some cases, the court will want to guide the jury’s consideration of the value of the property. The definition of value is taken from 18 U.S.C. § 641. That statute addresses theft or embezzlement of public money, property or records and provides “[t]he word ‘value’ means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.”

6.18.659B Possession of Property Stolen from an Interstate Shipment (18 U.S.C. § 659) (Second Paragraph)

Count *(number)* of the indictment charges the defendant *(name)* with *(briefly state offense; e.g., possessing property stolen from an interstate shipment)*, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That someone *(stole)* *(embezzled)* the property described in the indictment from *(specify location set forth in statute, e.g., a railroad car)*, as alleged in the indictment, while such property *(was moving as)* *(was a part of)* an interstate *(or foreign)* shipment of freight;

Second: That *(name)* thereafter *(bought)* *(received)* *(possessed)* such property knowing that it had been *(stolen)* *(embezzled)*; and

Third: That the property then had a value of \$1,000 or more.

[The word “value” means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.]

“An interstate *(a foreign)* **shipment” means goods or property which are in the process of being shipped from state** *(country)* **to another.**

The interstate *(or foreign)* **character of a shipment begins when the goods or property are** *(is)* **first identified and set aside for shipment from one state** *(country)* **to another; and the interstate** *(or foreign)* **character of the shipment**

continues until the shipment arrives at its final destination and is there delivered.

While the government must prove the interstate (or foreign) character of the shipment, the government is not required to prove that either the person who stole the property or the defendant knew that the goods were a part of such a shipment at the time they were stolen. But the government must prove that (name) knew the property was stolen property at the time (he)(she) [(bought) (received) (possessed)] it.

[Use the following language where appropriate:

To “embezzle” means to wrongfully, intentionally take property of another after the property has lawfully come within the possession or control of the person taking it.

To “steal” means to wrongfully take money or property, belonging to another with intent to permanently deprive the owner of its use or benefit.

Any appreciable change of the location of the property with the intent to deprive constitutes a stealing whether or not there is actual removal of it from the owner's premises.]

Comment

Fifth Circuit § 2.37.

The second paragraph of 18 U.S.C. § 659 provides

Whoever buys or receives or has in his possession any such goods or chattels,
knowing the same to have been embezzled or stolen

commits a federal offense. 18 U.S.C. § 659 further provides that the sentence for a violation is a fine and/or up to 10 years in prison if the value of the property is \$1,000 or more.

The first element is that the property was stolen, embezzled, unlawfully taken, carried away, or concealed through fraud or deception from a location that satisfies the requirements of the statute. In *United States v. Manuszak*, 234 F.2d 421, 423 (3d Cir. 1956), the Third Circuit reversed a conviction under Section 659 holding that “[u]nder . . . (18 U.S.C.A. Section 659), it is not a federal crime to steal goods from an interstate shipment of freight unless the goods are taken from one of the specifically enumerated places or facilities. Other thefts, although of goods which are part of an interstate shipment, are not federal crimes. That being so, an indictment which only charges a theft of goods from an interstate shipment of freight without alleging that the goods were taken from one of the specifically enumerated places or facilities does not charge all the essential ingredients of a crime so far as the federal government is concerned.” See also *United States v. Allegrucci*, 258 F.2d 70, 75 (3d Cir. 1958) (faulting the district court for failing to follow the mandate of *Manuszak* and instruct the jury that it must determine that the stolen goods were taken from a platform, a place specified in the statute). The instruction reflects this requirement.

The second element is that the defendant bought, received, or possessed property taken from an interstate shipment or shipment in foreign commerce knowing that it had been stolen or embezzled. In *United States v. Allegrucci*, 258 F.2d 70 (3d Cir. 1958), the Third Circuit addressed the element of intent. The court wrote:

An essential element of proof of a violation of Section 659 is that the defendant knew that the goods of which he was in possession were stolen, but it is clear that such knowledge may be proved by circumstantial evidence. Unexplained possession of recently stolen goods permits the jury to infer that the possession is guilty possession; that the defendant knew that the goods were stolen. It is not necessary to establish that defendant knew the goods were in interstate commerce when they were stolen.

258 F.2d at 73.

The third element is value of \$1000 or more. In *United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987), the Third Circuit held that “the value of the goods stolen is a necessary element for conviction of a felony under 18 U.S.C. § 659.” If the government establishes all the elements except for the fourth, the defendant is guilty of a misdemeanor. *Scanzello*, 832 F.2d at 23.

In some cases, the court will want to guide the jury's consideration of the value of the property. The definition of value is taken from 18 U.S.C. § 641. That statute addresses theft or embezzlement of public money, property or records and provides "[t]he word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

6.18.659B -1 Possession of Property Stolen from an Interstate Shipment - Inference of Knowledge from Possession of Recently Stolen Property

You have heard evidence that *(name)* was in possession of property recently stolen from interstate *(foreign)* commerce. If the government proves beyond a reasonable doubt that the property in question had recently been stolen from interstate *(foreign)* commerce, and that *(name)* was in unexplained possession of that recently stolen property, then you may, although you need not, find that *(name)* knew the property was stolen.

The term "recently" has no fixed meaning. Whether the property may be considered 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 the connection between the defendant's possession of the property and the theft.

Let me emphasize that you may, but are not required, to make the connection between the defendant's unexplained possession of recently stolen property and knowledge that the property was stolen. The mere fact that I am telling you about this connection does not mean that I am encouraging you to make it. You have the right to reject this connection if you deem it appropriate to do so, even if you find that *(name)* was in possession of the property in question and has not offered any satisfactory explanation for this possession. Consider all the facts and

circumstances shown by the evidence in making this determination. Remember that, at all times, the government has the burden of proving beyond a reasonable doubt that (name) knew the property was stolen, and that (name) is not required to offer any explanation at all.

Comment

See Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes 25-11* (Matthew Bender 2003).

In *United States v. Rispo*, 470 F.2d 1099, 1101 (3d Cir. 1973), a case addressing the defendants' challenge to convictions for, among other charges, transporting a stolen firearm, the Third Circuit considered the inference to be drawn from possession of recently stolen goods. The court noted that "such an instruction would be improper, absent proof of actual or constructive possession of the stolen property." The court went on to conclude that "[c]onsidering the evidence of such possession in this case, the court correctly charged that possession of the recently stolen property, not satisfactorily explained, was a circumstance from which the jury could infer that the persons in possession knew the property was stolen." *See also Barnes v. United States*, 412 U.S. 837 (1973) (upholding instruction permitting inference of knowledge from unexplained possession of recently stolen mail); *United States v. Whitfield*, 378 F. Supp. 184, 188 (E.D. Pa. 1974) (holding permissive inference instruction proper); *see also United States v. Allegrucci*, 258 F.2d 70, 72-73 (3d Cir. 1958) (condemning instruction that created presumption from possession of recently stolen property).