

Criminal Possession Of A Weapon In The Third Degree
Penal Law § 265.02(10)
Possesses Unloaded Firearm &
Commits VFO
(Committed on or after March 16, 2013)

The (*specify*) count is Criminal Possession of a Weapon in the Third Degree.

Under our law, a person is guilty of Criminal Possession of a Weapon in The Third Degree when such person knowingly possesses an unloaded firearm and also commits any¹ (*specify applicable violent felony offense defined in Penal Law § 70.02 [1]*) as part of the same criminal transaction.

The following terms used in that definition have a special meaning:

A FIREARM means any pistol or revolver.²

Under this count, a firearm that is unloaded must nevertheless be proven to be operable, meaning the firearm must be capable of discharging ammunition. The person who possesses a firearm is not required to know that it was operable.³

¹ At this point, the statute continues: “violent felony offense as defined in subdivision one of section 70.02 of this chapter.”

² Penal Law § 265.00(3). The statutory definition of a “firearm” includes other weapons. If, therefore, a firearm, other than a pistol or revolver, is in issue, see “**DEFINITION OF FIREARM AS OTHER THAN A PISTOL OR REVOLVER**” in “Additional Charges” at the end of the Table of Contents for Penal Law article 265 crimes.

³ Case law has added “operability” of a firearm as an element of the crime (see *People v Longshore*, 86 NY2d 851, 852 (1995), but has further held that there is no requirement that the possessor know the firearm was operable (see *People v Parrilla*, 27 N.Y.3d 400 (2016) (“Defendants need only knowingly possess a firearm, they need not know that the firearm was loaded or operable”); *People v Saunders*, 85 NY2d 339, 341-342 (1995); *People v Ansare*, 96 AD2d 96, 97 (4th Dept 1983).

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property.⁴

A person KNOWINGLY possesses a firearm when that person is aware that he or she is in possession of an object that is a firearm.⁵ That person need not know (that is, be aware of) the object's name or whether it meets the definition of a firearm.⁶

(Specify the name of the applicable violent felony offense).

Note: If that offense is also a count of the indictment and the jury has been instructed on that offense, a cross-reference to that instruction may be given here. Otherwise, the definition of that offense must be given the jury here.

⁴ Penal Law § 10.00(8). Where constructive possession is alleged, or where the People rely on a statutory presumption of possession, see the "Additional Charges" section at the end of the "Table of Contents" of the charges for this article for the appropriate charge.

⁵ See Penal Law § 15.05(2); For an expanded charge on the definition of "knowingly," see Instructions of General Applicability, Culpable Mental States, Knowingly.

⁶ See *People v Parrilla*, 27 N.Y.3d 400, 405 (2016) (when possession of a gravity knife was a crime, defendants were required to know that "they possessed a knife" but the People were not required "to prove that defendants knew that the knife in their possession met the statutory definition of a gravity knife"); *People v Hernandez*, 180 AD3d 1234, 1237 (3d Dept 2020) ("Contrary to defendant's contention, the court was not required to instruct the jury that the People were required to show that defendant was aware of the legal definition of a blackjack. The characteristics of the blackjack at issue—a lead core, surrounded by leather, which is flexible and used as a weapon—make 'the inherently dangerous nature of the prohibited object be readily apparent, so as to put [defendant] on clear notice that the object is potentially subject to government regulation or prohibition' Accordingly, the People did not have to prove that defendant was aware of the statutory definition of a blackjack"); *People v Steinmetz*, 177 AD3d 1292, 1293 (4th Dept 2019) ("The People were not required to establish that defendant knew the rifles met the statutory criteria of an assault weapon but, rather, only that he knowingly possessed the rifles"); *People v Abdullah*, 206 AD3d 1340, 1344 (3d Dept 2022) (knowing possession of a slungshot is required but a defendant need not know the dictionary definition of slungshot).

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the of evidence in the case, beyond a reasonable doubt, each of the following four elements:

1. That on or about (date), in the County of (County), the defendant, (defendant's name), possessed a firearm;
2. That the defendant did so knowingly;
3. That the firearm was operable; and
4. That the defendant committed (specify the applicable violent felony offense).

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of this crime.