

United States District Court

District of Arizona

United States of America, )  
Plaintiff )  
v. )  
John Coach, a single individual; )  
Jimmy Jim, a single individual; )  
Defendants )

Case No. CR-3279 Destination 1 PHX

ORDER ON LESSER INCLUDED OFFENSE

The defendants are charged with conspiracy to transport in foreign commerce helium-3 stolen, converted, or taken by fraud.

**Instruction No. 11.** For the defendants to be found guilty of transportation in foreign commerce of helium-3 stolen, converted, or taken by fraud, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant transported stolen helium-3 on Destination;

Second, at the time that the helium-3 was transported, the defendant knew it was stolen, converted, or taken by fraud;

Third, the defendant intended to deprive the owner of the ownership of the helium-3 temporarily or permanently; and

Fourth, the helium-3 was of the value of \$5,000 or more.

Source: Manual of Model Criminal Jury Instructions (Ninth Circuit) 23.8 (modified); 18 U.S.C. § 2314.

Defendants offer the following jury instruction:

**Instruction No. 43.** The crime of transporting stolen property includes the lesser crime of stealing personal property. If

(1) all of you are not convinced beyond a reasonable doubt that the defendant is guilty of transporting stolen property; and

(2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of stealing personal property, you may find the defendant guilty of the lesser included crime.

For the defendant to be found guilty of the lesser crime of stealing personal property, the government must prove each of the following elements beyond a reasonable doubt:

1. within the special maritime and territorial jurisdiction of the United States,

2. defendant took and carried away,
3. with intent to steal or purloin,
4. any personal property of another,
5. of a value exceeding \$1,000.

Source: Model Jury Instructions Ninth Circuit 6.14 Modified); 18 U.S.C. § 661.

Pursuant to Fed. R. Crim. P. 31(c), “[a] defendant may be found guilty of . . . an offense necessarily included in the offense charged.”

Whether an offense is a lesser included offense of a charged crime is a question of law. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007).

“A defendant is entitled to an instruction on a lesser-included offense if the law and evidence satisfy a two-part test: 1) ‘the elements of the lesser offense are a subset of the elements of the charged offense,’ *Schmuck v. United States*, 489 U.S. 705, 716, 109 S. Ct. 1443, 1447 (1989); and 2) ‘the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit [her] of the greater,’ *Keeble v. United States*, 412 U.S. 205, 208 (1973).”

*Arnt*, 474 F.3d at 1163 (alterations in original).

The elements of stealing personal property are not a subset of the elements of transporting stolen property.

transported stolen helium-3	took and carried away personal property
knew it was stolen, converted, or taken by fraud	intent to steal or purloin
intended to deprive the owner of the ownership temporarily or permanently	

intent to steal is not a subset of knowing it was stolen. It is possible to transport stolen property without stealing personal property; consequently, stealing personal property is not a lesser included offense.

/Signed/  
U.S. District Court Judge