, the defendant in this case, has been charged with the crime of theft of services by diversion.

To prove that the defendant committed this crime, the state must prove beyond a reasonable doubt each of the following elements:

(1) the defendant had control over the disposition of services of others to which he was not entitled;

(2) the defendant knowingly diverted those services to the defendant's own benefit or to the benefit of another not entitled to them;

(3) the defendant knew the defendant had no authority to divert the services in that way; and

(4) [(for first degree) the value of the services was $25,000 or more.]

(4) [(for second degree) [the value of the services was $750 or more] [the value of the services was $250 or more and (5) within the preceding five years, the defendant has been convicted and sentenced for theft or concealment of merchandise on two or more separate occasions in this or another jurisdiction].]

(4) [(for third degree) [the value of the services was $250 or more] [the value of the services was less than $250 and (5) within the past five years, the defendant has been convicted and sentenced for theft or concealment of merchandise on two or more separate occasions in this or another jurisdiction].]

[4] [(for fourth degree) the value of the services was less than $250.]

# USE NOTE

The following terms are defined in other instructions:

"knowingly" - 11.81.900(b)

"services" - 11.81.900(b)

For determination of value, see AS 11.46.980.

Note that, for certain offenses, an additional numbered element (5) has been indicated and should be listed as a separate element.

Alaska Statute 11.46.295 provides that for purposes of considering prior convictions in prosecuting certain subsections of the theft or concealment of merchandise statutes, "a conviction for an offense under law or ordinance with similar elements" is a conviction of an offense having elements similar to those of an offense defined as such under Alaska law at the time the offense was committed.

Unless the parties stipulate to prior convictions, the state must prove them as essential elements to the jury. See, Morgan v. State, 661 P.2d 1102 (Alaska App. 1983); Wortham v. State, 689 P.2d 1133 (Alaska App. 1984); and Azzarella v. State, 703 P.2d 1182 (Alaska App. 1985).

Bifurcation of the trial to separate issues regarding prior convictions is required unless the trial judge determines that evidence concerning the prior convictions is otherwise relevant and satisfies Evidence Rule 403. Ostlund v. State, 51 P.3d 938 (Alaska App. 2002).

Theft in the Second Degree is defined as theft of property worth less than $25,000 but more than $750 (except for recidivists); however, any value over $750 will suffice. (For recidivists, any value over $250 will suffice.) *See* AS 11.81.615.

Theft in the Third Degree is defined as theft of property worth less than $750 but more than $250 (except for recidivists); however, any value over $250 will suffice. (For recidivists, any value will suffice.) *See* AS 11.81.615.

Theft in the Fourth Degree is defined as theft of property worth less than $250; however, any value will suffice. Because property having a greater value than $250 is not a defense, this instruction does not include the value element. *See* AS 11.81.615.