, the defendant in this case, has been charged with the crime of vehicle theft in the first degree.

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

(1) the defendant knowingly drove, towed away, or took the propelled vehicle of another;

(2) when the defendant initially drove, towed away, or took the propelled vehicle, [he] [she] had no right to do so and no reasonable ground to believe [he] [she] had such a right; and

(3) within the seven years preceding [insert date of offense], the defendant was convicted of [Vehicle Theft in the First Degree] [Vehicle Theft in the Second Degree] [Theft in the [First] [Second] [Third] Degree and the offense involved the theft of a propelled vehicle] [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ].

#### USE NOTE

The following terms are defined in other instructions:

"knowingly" – 11.81.900(a)

"propelled vehicle" – 11.81.900(b)

The "knowingly" mental state is included in the first element based on Dobberke v. State, 40 P.3d 1244 (Alaska App. 2002): "it is a felony to knowingly drive, tow away, or take a car belonging to another while having no right or reasonable belief in a right to do so." Id. at 1247 (emphasis added).

The second element states that the defendant had no right or reasonable belief in a right to take the vehicle "when" the vehicle was "initially" taken. This language is also based on Dobberke, where the court held in a prosecution under AS 11.46.360(a)(1): "Accordingly, in first-degree vehicle theft cases, the State must prove that the defendant’s initial taking of the vehicle was trespassory." Id. at 1247 (emphasis added).

11.46.360(a)(4)(B)-(C) includes former AS 11.46.482(a)(4) or (5) (Criminal Mischief in the Second Degree) and former AS 11.46.484(a)(2) (Criminal Mischief in the Third Degree) as qualifying prior convictions within the seven years preceding the date of the present offense. However, because 11.46.482(a)(4) and (5) and 11.46.484(a)(2) were repealed in 1996, it is highly unlikely that a defendant could be charged under this theory, and so it is omitted from the instruction.

Alaska Statute 11.46.360(a)(4)(E) provides that a person can be found guilty of vehicle theft in the first degree if the person commits the elements of second degree theft under AS 11.46.365(a)(1) and the person has been convicted within the previous seven years "under a law or ordinance of this or another jurisdiction with elements substantially similar to those of an offense described in” AS 11.46.360(a)(4)(A)-(D).

Unless the parties stipulate to the 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).