

1353C DISTRIBUTION OF A HAZARDOUS SUBSTANCE KNOWING IT WILL BE ABUSED — § 941.316(3)**Statutory Definition of the Crime**

Distribution of a hazardous substance knowing it will be abused, as defined in § 941.316(3) of the Criminal Code of Wisconsin, is committed by one who distributes, or possesses with intent to distribute, a hazardous substance,¹ knowing or having reason to know that the hazardous substance will be abused.²

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (distributed) (possessed with intent to distribute) a hazardous substance.

“Distributed” means that the defendant transferred a hazardous substance from (himself) (herself) to another person.³

“Hazardous substance” means (insert the applicable statutory definition or characteristic under § 100.37(1)(c), if relied on). [“Hazardous substance” also includes any substance or mixture of substances that has the capacity to produce

personal injury or illness to a person who abuses the substance and includes any household product⁴, or any mixture of household products.]⁵

“Possessed” means that the defendant knowingly⁶ had actual physical control of the hazardous substance.⁷

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person’s possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in (his) (her) possession, even though another person may also have similar control.]

ADD THE FOLLOWING IF THE POSSESSION-WITH-INTENT-TO-DISTRIBUTE ALTERNATIVE IS SUBMITTED:

“With intent to distribute” means that the defendant had the purpose to transfer the hazardous substance to another person.⁸

2. The defendant knew⁹ or had reason to know that the hazardous substance would be abused.

“Abuse” means to ingest, inhale, or otherwise introduce into the human body a hazardous substance in a manner that does not comply with any cautionary labeling required for the hazardous substance under § 100.37 or under federal law, or in a manner not intended by the manufacturer of the hazardous substance, and

that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.¹⁰

A person has reason to know that a hazardous substance will be abused if the facts and circumstances known to the person would cause a reasonable person in the defendant's position to believe that the hazardous substance will be abused.

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. What a person knows or has reason to know must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1353C was approved by the Committee in June 2026.

This instruction is for violations of § 941.316(3), which is punishable as a Class I felony. Wis JI-Criminal 1353A and 1353B are drafted for the Class A misdemeanor offenses under § 941.316(2). Section 941.316(5) provides that sub. (3) does not apply to a person who distributes a hazardous substance in the ordinary course of business. This exception should be addressed in a separate instruction if supported by the evidence.

1. The term “hazardous substance” is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended statutory definition. See note 5, below.

2. The definition of “abuse” is provided by § 941.316(1)(a). See note 10, below. The prosecution must show that the defendant distributed or possessed with intent to distribute the hazardous substance, knowing or having reason to know that the substance would be used in the manner described by the abuse definition — that is, in a non-compliant or manufacturer-unintended manner aimed at inducing intoxication, elation, central-nervous-system stupefaction, or altered audio, visual, or mental processes.

3. Section 941.316(1)(b) defines “distribute” as follows:

“Distribute” means to transfer a hazardous substance from one person to another.

For the possession-with-intent-to-distribute alternative, see Wis JI–Criminal 920 and the Comment to that instruction for a discussion of constructive possession.

4. Section 941.327(1)(e) defines “household product” as follows:

“Household product” means any food, drug, device or cosmetic or any article, product or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that consumption or use.

5. The term “hazardous substance” is defined in § 941.316(1)(c) by reference to § 100.37(1)(c) and by the extended definition in § 941.316(1)(c) itself. Under § 100.37(1)(c)1., “hazardous substance” means any substance or mixture of substances — including a toy or other article intended for use by children — which is toxic, corrosive, an irritant, a strong sensitizer, flammable or combustible, or generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

The term also includes any substance or mixture of substances having the capacity to produce personal injury or illness to a person who abuses the substance, and includes any household product as defined in § 941.327(1)(e). Section 941.327(1)(e) defines “household product” as any food, drug, device, or cosmetic, or any article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies for consumption by individuals or for use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of that use.

If the identity or character of the substance is not in dispute, no definition need be given. If the nature of the substance is contested, the court should instruct the jury on the applicable definition.

6. Inherent in the legal definition of “possession” is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

7. The definition of “possession” is based on the one provided in Wis JI–Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant’s control but not in his or her physical possession. See the Comment to Wis JI–Criminal 920 for a discussion of various issues relating to “possession” in criminal cases, including so-called constructive possession.

8. See Wis JI–Criminal 923A for a discussion of various issues relating to the definition of “with intent to.”

9. “Know” under § 939.23(2) requires only that the actor believes that the specified fact exists. The “having reason to know” standard is distinct and does not require subjective belief; it is satisfied when the circumstances known to the defendant would lead a reasonable person to conclude that the substance would be abused. See generally Wis JI–Criminal 923A.

The distinction between actual knowledge (“knowing”) and constructive knowledge (“having reason to know”) reflects the statutory language. The “having reason to know” standard is an objective inquiry — what a reasonable person would conclude from the circumstances — and does not require proof of actual subjective awareness. See § 939.23(2) (“Know” requires only that the actor believes that the specified fact exists); cf. Wis JI–Criminal 923A.

10. This is the definition of “abuse” provided in § 941.316(1)(a). The definition has two components: (1) introduction of the substance into the human body in a manner that violates cautionary labeling or the manufacturer’s intended use; and (2) an intent to induce intoxication or elation, stupefy the central nervous system, or alter audio, visual, or mental processes. Both must be established. The conduct element differs from the intent element: the conduct need only violate labeling or manufacturer intent, but the abuse must be aimed at one of the listed cognitive or sensory effects.