

6020 DELIVERY OF A CONTROLLED SUBSTANCE — § 961.41(1)**Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime to deliver¹ a controlled substance.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered a substance.

"Deliver" means to transfer or attempt to transfer something from one person to another.²

2. The substance was (name controlled substance).³ (Name controlled substance) is a controlled substance whose delivery is prohibited by law.
3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.]⁴

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable

doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to find knowledge or belief. Knowledge or belief 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 all three 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 6020 was originally published in 1981 and revised in 1990, 1992, 1996, 1999, and 2010. This revision was approved by the Committee in April 2018; it added a cross reference to Wis JI-Criminal 6001 to the Comment.

The penalty for offenses involving the delivery of a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

The 1996 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

- (1) renumbering the statute to § 961.41;
- (2) adding "distributing" to the prohibited conduct; and
- (3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For

offenses involving "manufacture, see Wis JI-Criminal 6021. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6020A and 6005.

It might be assumed the possession of a controlled substance is a lesser included offense of delivery of a controlled substance, but this may not be the case. In State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991), the court held that possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). That homicide offense requires that the defendant "cause the death of another . . . by manufacture, distribution, or delivery of a controlled substance in violation of § 961.41. . . ." (Wis JI-Criminal 1021.) The Clemons court held that the strict statutory elements test for lesser included offenses was not satisfied because one can "deliver" without "possession," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512. Apparently the same conclusion should apply to the delivery offense defined by this instruction.

1. Section 961.41(1) prohibits the delivery, distribution, or manufacture of a controlled substance. The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For offenses involving "manufacture, see Wis JI-Criminal 6021. The penalty for the offense depends on the nature of the substance; see subsections (a)-(j) of § 961.41(1).

2. This definition was adapted from that found in § 961.01(6), which reads as follows:

"Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

It is no defense that the defendant delivered a controlled substance which he erroneously believed to be a different controlled substance at least where both substances are listed in the same schedule. State v. Smallwood, 97 Wis.2d 673, 294 N.W.2d 51 (1980).