

**6021 MANUFACTURE OF A CONTROLLED SUBSTANCE — § 961.41(1)****Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime to manufacture 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 manufactured a substance.<sup>1</sup>

“Manufacture” means to produce<sup>2</sup> a substance.

2. The substance was (name controlled substance).<sup>3</sup> (Name controlled substance) is a controlled substance whose manufacture 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 possession of which is prohibited by law.]<sup>4</sup>

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD 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 determine 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 or belief.

### **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 6021 was originally published in 1985 and revised in 1989, 1994, 1996, 2001 and 2010. This revision was approved by the Committee in December 2023; it added to the comment.

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

1. The instruction is drafted for what the Committee believes will be the most typical case – one that involves the manufacture of a substance. However, in State ex rel. Bell v. Columbia County, 82 Wis.2d 401, 263 N.W.2d 162 (1978), the supreme court held that it is the act of manufacturing that is prohibited; the state need not allege or prove that a controlled substance was actually manufactured or that the defendant possessed a manufactured controlled substance. Bell involved a challenge to the sufficiency of a complaint charging manufacture. The defendant possessed large quantities of everything needed to produce methamphetamine but none of the completed product was on the premises when the arrest took place. The defendant claimed the complaint was defective because it failed to allege that a controlled substance was actually produced. The supreme court rejected the claim.

For a case like Bell, the first element of the instruction should be modified to read as follows:

1. The defendant engaged in the act of manufacturing a substance. It is not required that a substance was actually produced.

2. Subsection 961.01(13) provides a lengthy definition of “manufacture” that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses “produce” because the Committee concluded that it is likely to apply in the greatest number of cases. The complete definition in § 961.01(13) is as follows:

If there is a dispute about whether a particular action constitutes “manufacturing,” a detailed definition is provided by § 961.01(13):

“Manufacture” means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repack or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. “Manufacture” does not mean to prepare, compound, package, repack, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:

- (a) By a practitioner as an incident to the practitioner’s administering or dispensing of a controlled substance in the course of the practitioner’s professional practice; or
- (b) By a practitioner, or by the practitioner’s authorized agent under the practitioner’s supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for “the preparation or compounding of a controlled substance by an individual for his own use” was eliminated.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance because the Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the substance actually is the substance named and whether the defendant actually manufactured the substance remain questions for the jury.

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.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.