6031 ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess or attempt to possess (name controlled substance)[1]. (Name controlled substance)[2] is a controlled substance whose possession is prohibited by law.][3]

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 attempted to possess a substance.

   Attempt requires that the defendant intended to possess (name controlled substance) and did acts which indicated unequivocally that the defendant intended to possess (name controlled substance) and would have done so except for the intervention of another person or some other extraneous factor.[4]

   "Possessed" means that the defendant knowingly[5] had actual physical control[6] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][7]

2. 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.][8]

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

You cannot look into a person's mind to find knowledge. Knowledge 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 6031 was originally published in 1995 and revised in 1996, 2010, 2014, 2015, and 2020. The 2020 revision reflected changes to the Comment made by 2019 Wisconsin Act 68. This revision

was approved by the Committee in December 2023; it added to the comment.

Section 961.41(3g) prohibits both "possession of" and "attempts to possess" controlled substances and the analogs of those substances. This instruction is drafted for a case involving a charge of attempted possession. It differs from the instruction for possession cases (see Wis JI-Criminal 6030) in that it has two elements instead of three. The second element of the possession offense – "that the substance was (name controlled substance)" – has been eliminated here. It is sufficient to constitute an attempt that the defendant intended to possess a controlled substance; it is not required that the substance in fact be a controlled substance. (See State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1995), holding that it constitutes an attempt to receive stolen property where the defendant intended to receive property that in fact was not "stolen," but which he believed to be stolen.)

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

(3g)(am) — a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) — a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) — cocaine or cocaine base
(3g)(d) — lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) — tetrahydrocannabinols
(3g)(em) — synthetic cannabinoids
(3g)(f) — gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) — methamphetamine

Note: All the penalty subsections except sub. (3g)(am) refer to "possesses or attempts to possess" – see the discussion preceding footnote 1.

2. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

If the evidence shows that the substance tested positive for tetrahydrocannabinols, note that under sec. 961.14(4)(t), tetrahydrocannabinols does not include any of the following:

> 1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in s. 961.38 (1n) (a) or that is possessed as provided in s. 961.32 (2m) (b).
> 2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made

> from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
> 3. Tetrahydrocannabinols contained in hemp, as defined in s. 94.55 (1).
> 4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been possessed or attempted to be possessed by the defendant is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been possessed or attempted to be possessed by the defendant. Whether the defendant actually intended to possess the substance remains a question for the jury.

4. The definition of attempt provided here is adapted from the full definition in § 939.32. The definition in § 939.32 "applies to crimes throughout the statutes and is not limited to the Criminal Code." § 939.20. The briefer definition is believed to be sufficient for most cases. If more is desired, see Wis JI-Criminal 580, Attempt. Wis JI-Criminal 580 includes an extensive Comment, including a discussion of State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), which held that proof of the existence of an "extraneous factor" is not required to establish a criminal attempt.

5. 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). Also see note 2, supra.

6. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [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.]
> [It is not required that a person own an item in order to possess it. What is required is that the person 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 possession, even though another person may also have similar control.]

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.

7. See State v. Dodd, 28 Wis.2d 643, 651 52, 137 N.W.2d 465 (1965).

8. 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.