

6035 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to deliver.

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 four elements were present.

Elements of Possession With Intent To Deliver That the State Must Prove

1. The defendant possessed a substance.

“Possessed” means that the defendant knowingly¹ had actual physical control² of a substance.

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.]³

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession 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.]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.]

4. The defendant intended to deliver (name controlled substance).

“Deliver” means to transfer or attempt to transfer from one person to another.⁵

“Intended to deliver” means that the defendant had the purpose to deliver or was aware that (his) (her) conduct was practically certain to cause delivery.⁶

Deciding About Intent and Knowledge

You cannot look into a person’s mind to find intent and knowledge. Intent and 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. As a part of the circumstances, you may consider the quantity and monetary value of the substance.⁷

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to deliver have been proved, you should find the

defendant guilty.

If you are not so satisfied, you must not find the defendant guilty of possession with intent to deliver,⁸ [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41 _____⁹ of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to deliver before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to deliver, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession 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.]¹⁰

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 of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6035 was originally published in 1976 and revised in 1987, 1990, 1996, 2010, and 2018. The 2018 revision added a cross reference to Wis JI-Criminal 6001 to the Comment. This revision was approved by the Committee in December 2023; it added to the comment.

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

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

A person who holds drugs for another and intends to return the drugs to that person has the "intent to

deliver” required for a violation of § 961.41(1m). State v. Pinkard, 2005 WI App 226, 287 Wis.2d 592, 706 N.W.2d 157. “Whether Pinkard had delivered the drugs to the original owner for distribution to buyers, or to a third party for distribution to buyers, the ultimate conduct would have been the same: delivering drugs for use by others, a crime the legislature intended to punish under Wis. Stat. § 961.41(1m).” Ibid, ¶12.

1. 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 5.

2. 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.

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

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.

5. See section 961.01(6).
6. See section 939.23(4) and Wis JI-Criminal 923B.
7. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

8. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

9. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

10. See note 4, supra.