

**6037B KEEPING OR MAINTAINING A PLACE USED FOR
MANUFACTURING, KEEPING, OR DELIVERING CONTROLLED
SUBSTANCES — § 961.42¹**

Statutory Definition of the Crime

Section 961.42 of the Wisconsin Statutes provides that it is unlawful for any person knowingly to keep or maintain any structure or place² which is used for manufacturing, keeping, or delivering controlled substances.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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant kept or maintained a structure or place.⁴

To keep or maintain a place is to exercise management or control over the place.

This element does not require that the defendant owned (name of place), but it does require that the defendant exercised management or control of the place in question.⁵

2. The place was used for (manufacturing) (keeping) (delivering) (name controlled substance).⁶ (Name controlled substance) is a controlled substance whose (manufacture) (keeping) (delivery) is prohibited by law.

["Manufacturing" means the production, preparation, propagation, or processing of a controlled substance.]⁷

["Keeping" requires that controlled substances be kept for the purpose of warehousing or storage for ultimate manufacture or delivery. It requires more than simple possession.]⁸

["Delivering" means the transfer or attempt to transfer something from one person to another.]⁹

3. The defendant kept or maintained the place knowingly.

"Knowingly" requires that the defendant knew that the place was used for the (manufacture) (keeping) (delivery) of (name controlled substance).¹⁰

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 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 6037B was originally published as Wis JI-Criminal 6037 in 1989. It was renumbered Wis JI-Criminal 6037B and revised in nonsubstantive ways in March 1993. It was revised in

1994 to change the definition of "manufacture." See footnote 7, below. It was revised in 1996 to add to the text at footnote 5 and in 2008 to adopt a new format. This revision was approved by the Committee in February 2010 and involved nonsubstantive changes to the text.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.42 applies to keeping or maintaining a structure or place for two different illicit purposes: for use by persons using controlled substances in violation of Chapter 961; and for manufacturing, keeping, or delivering controlled substances in violation of Chapter 961. The latter alternative is addressed by this instruction. The former is addressed by Wis JI-Criminal 6037A.

2. The instruction refers to "structure or place," but § 961.42 provides a more extensive list: ". . . any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place." The rest of the instruction uses the general term, "place." If one of the more specific terms is identified by the charge or the evidence, it should be used in the instruction as well.

For a case involving a vehicle, see State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284, where the court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine. See note 8, below.

3. Section 961.42(1) defines this offense in terms of maintaining a place "which is used for manufacturing, keeping, or delivering [controlled substances] in violation of this chapter," (emphasis added). Generally, the underlined phrase would require adding to the instruction that the manufacture, keeping, or delivery be "in violation of Chapter 961." That addition was not made in this instruction, however, because the Committee concluded that the other elements of the offense, properly defined, will always establish that the manufacture, keeping, or delivery was in violation of Chapter 961.

The only exception would be where one of the exceptions to the penalties imposed by Chapter 961 applies, such as the possession and special use authorizations set forth in §§ 961.32 and 961.335, respectively. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925). These situations are best handled, in the Committee's judgment, in the same manner as an "affirmative defense." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

4. See note 2, supra.

5. "Keep" is not defined in statutes or case law. The Committee concluded that it implies the exercise of management or control over the operation of the place. See Wis JI-Criminal 1570, Keeping a Place of Prostitution.

6. The instruction provides for inserting the name of the specific controlled substance, based on the Committee's conclusion that it adds clarity to do so. Whether the place was actually maintained for

the manufacture, keeping, or delivery of the controlled substance is the factual issue for the jury to determine.

7. The definition of "manufacture" is based on the one provided in § 961.01(13), as revised by 1993 Wisconsin Act 129 (effective date: March 19, 1994). In addition to grammatical changes, the statutory revision made one substantive change: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated. The exceptions for practitioners remain. See note 3, Wis JI-Criminal 6021.

8. In State v. Brooks, 124 Wis.2d 349, 369 N.W.2d 183 (Ct. App. 1985), the court held that "keeping" had to be defined in a way that distinguished it from mere possession under § 961.41(3): "We read into the noun 'keeping' in sec. 961.42(1) the requirement that the controlled substance be kept for the purpose of warehousing or storage for ultimate manufacture or delivery." 124 Wis.2d 349, 354.

Brooks was applied to a case involving a vehicle in State v. Slagle, 2007 WI App 117, 300 Wis.2d 662, 731 N.W.2d 284. The court found the evidence insufficient to establish that the use of a vehicle on a single occasion was for "keeping" cocaine.

9. This definition was adapted from the one provided in § 961.01(6). See note 3, Wis JI-Criminal 6020.

10. Section 961.42(1) specifically requires that the violation be committed "knowingly." This requires knowledge that the place was used in connection with controlled substances. For a discussion of various issues relating to the knowledge requirement in controlled substance cases, see Wis JI-Criminal 6000.