

**6038 ACQUIRING POSSESSION OF A CONTROLLED SUBSTANCE BY  
MISREPRESENTATION — § 961.43(1)(a)**

**Statutory Definition of the Crime**

The Wisconsin Statutes<sup>1</sup> make it a crime to acquire possession of (name controlled substance)<sup>2</sup> by misrepresentation.

**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 five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant obtained possession of a substance.<sup>3</sup>

“Possession” means that the defendant knowingly<sup>4</sup> had actual physical control of a substance.<sup>5</sup>

2. The substance was (name controlled substance).<sup>6</sup> (Name controlled substance) is a controlled substance whose possession is regulated by law.
3. The defendant believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is regulated by law.]<sup>7</sup>
4. The defendant obtained possession of the substance by misrepresentation made with the intent to deceive another and with intent to induce that person to rely and

act thereon.<sup>8</sup>

This element requires that the defendant intended to deceive (name person) and intended to induce (name person) to rely and act on the misrepresentation.

5. (Name person) was deceived by the misrepresentation.

This requires that (name person) must have been induced to and did in fact part with possession of the (name controlled substance) in reliance upon the misrepresentation.

### **Deciding About Belief and Intent**

You cannot look into a person's mind to find belief or intent. While belief and intent must be found as a fact before you can find the defendant guilty, they must be found, if found at all, from any acts, words, or statements bearing upon belief and intent.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five 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 6038 was originally published in 1983 and revised in 1987, 1995, 1996, 2007, 2010. This revision was approved by the Committee in December 2023; it added to the comment.

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

1. Section 961.43(1)(a) provides that it is unlawful for any person to “acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.”

2. The instruction has been drafted to provide for the insertion of the specific name of the substance as alleged in the information. The Committee has concluded that it adds clarity to use the name of the alleged substance throughout the instruction, although whether the defendant actually possessed the substance remains a question for the jury (see the second element).

3. Although it should rarely be in issue with respect to this offense, it is not required that a substantial amount of the substance be obtained – any amount is sufficient. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. 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 6, supra.

5. 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.

6. 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).

7. The defendant must believe that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

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.

8. The explanation of the fourth element was adapted from the elements of theft by fraud set forth in § 943.20(1)(d).