6040 DELIVERY OF AN IMITATION CONTROLLED SUBSTANCE: FELONY[1] — § 961.41(4)(am)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver[2] a substance to another person and represent to that person that the substance is a controlled substance, knowing that it is not 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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered[3] a substance[4] to (name recipient) .

   "Deliver" means to transfer or attempt to transfer something from one person to another.[5]

2. The defendant represented to (name recipient) that the substance was (name controlled substance) .

   (Name controlled substance) is a controlled substance.[6]

   This requires that the defendant indicated by words or conduct that the substance was (name controlled substance) .[7]

3. The substance was not a controlled substance.

It is not necessary for the State to establish what the substance was. It is sufficient if the substance was not a controlled substance.[8]

4. The defendant knew the substance was not a controlled substance.[9]

Deciding About Knowledge

You cannot look into a person's mind to determine 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 four 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 6040 was originally published in 1983 and revised in 1992, 1996, and 2001. This revision was approved by the Committee in April 2006.

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.

This instruction is for a violation of subsec. (am)1.a. of § 961.41(4), which was created as § 161.41(4)(a) by Chapter 90, Laws of 1981, and reads as follows:

> (4) IMITATION CONTROLLED SUBSTANCES (am)1. No person may knowingly distribute or deliver, attempt to distribute or deliver or cause to be distributed or delivered a noncontrolled substance and expressly or impliedly represent any of the following to the recipient:
> a. That the substance is a controlled substance.
> b. That the substance is of a nature, appearance or effect that will allow the recipient to display, sell, distribute, deliver, or use the noncontrolled substance as a controlled substance, if the representation is made under circumstances in which the person has reasonable cause to believe that the noncontrolled substance will be used or distributed for use as a controlled substance.

Subsection (4)(am)2. identifies several circumstances that are considered to be "prima facie" evidence of a representation that a substance is controlled.

Note that a penalty is provided in subsec. (4)(am)3.; the penalty structure set forth in § 961.41(1) does not apply to this offense.

A very similar offense with a misdemeanor penalty is defined in § 961.41(4)(bm). See Wis JI-Criminal 6042.

1. If the title is to be included in the written copy of the instructions provided to the jury, "FELONY" should be deleted.

2. The instruction is drafted for offenses involving "delivery." The statute also applies to "distribution," which is defined essentially as a "delivery." See § 961.01(9). Thus, instructing as to "delivery" ought to be sufficient in either situation.

The statute also applies to attempts to deliver or distribute and "causing" delivery or distribution. For "causing to deliver" cases, the instruction should be modified. The instruction ought to be sufficient as drafted for attempted delivery cases. "Deliver" is defined in § 961.01(6) as an "actual, constructive or attempted transfer from one person to another . . ." The instruction includes the substance of that definition in the first element. Also see note 4, below.

3. See note 2, supra.

4. The statute is phrased in terms of delivery "of a noncontrolled substance." "Noncontrolled substance" is not defined in the statutes and apparently has no special meaning. Therefore, the instruction is drafted in terms of "delivery of a substance," the conclusion of the Committee being that it is not necessary for the state to prove that the substance was "noncontrolled." However, it is necessary to establish that the substance was not what it was represented to be; see the third element.

5. This definition was adopted from that found in § 961.01(6) which reads as follows:

> "Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

6. Because all controlled substances are listed by name in the schedules in Chapter 961, the jury may be told that, for example, "cocaine is a controlled substance."

7. Subsection 961.41(4)(am)2. defines four types of conduct which are to be considered "prima facie evidence" of a representation that a substance is a controlled substance. The Committee concluded that the significance of these four matters should be that evidence tending to establish one of them is enough to justify sending the case to the jury. But the Committee also concluded that it was not appropriate to instruct the jury on the effect of the prima facie evidence.

8. See note 4, supra.

9. The knowledge element of the instruction is based on a plain language reading of the statute: "knowingly deliver a noncontrolled substance" means that the person must know that what he delivers is a

noncontrolled substance. This is believed to be consistent with the rule for Criminal Code offenses, to which § 939.23(2) applies: "'Know' requires only that the actor believes that the specified fact exists." Here, the "specified fact" is that the substance is noncontrolled.

In 1992, the Committee reviewed this knowledge element in light of case law from other states. Most states have statutes similar to Wisconsin's, and there is extensive case law interpreting those statutes. A majority of the decisions conclude that knowledge of the noncontrolled nature of the substance is not required. See State v. Shiffbauer, 251 N.W.2d 359 (Neb. 1977); People v. Pfarr, 696 P.2d 235 (Colo. 1984); State v. Thomas, 428 So. 2d 327 (Fla. App. 1983); State v. Marsh, 684 P.2d 459 (Kan. App. 1984); State v. Lauterbach, 653 P.2d 1320 (Wash. App. 1982); State v. Freeman, 450 N.W.2d 826 (Iowa 1990); Jenkins v. State, 788 S.W.2d 677 (Tex. App. 1990); State v. Pierre, 500 So.2d 382 (La. 1987); and Annotation, Validity, Construction, and Effect of State Statutes Regulating Sales of Counterfeit or Imitation Controlled Substances, 84 A.L.R.4th 936 (1991).

For contrary conclusions, see State v. Duncan, 414 N.W.2d 91 (Iowa 1987), and State v. Mughni, 514 N.E.2d 870 (Ohio 1987).

For several reasons, the Committee did not find the authority from other states persuasive. First, the statutes are all slightly different. Some use "knowingly" and some do not. Those that use "knowingly" do not connect it with "noncontrolled" as Wisconsin's statute does. For example, the Kansas statute says: "no person shall knowingly deliver any substance which is not a controlled substance . . . under circumstances which would give a reasonable person reason to believe it is a controlled substance." Nebraska prohibits: "knowingly or intentionally delivering a substance that the person represents is a controlled substance but which in fact is not such a substance." Both the Kansas and Nebraska courts held that it is not necessary to prove that the defendant knew the substance was not controlled. But neither statute connects "knowingly" with "noncontrolled substances."

Further, the legislative history of the Wisconsin provision is relevant. In an early draft of the bill, the main subsection of the statute, which was (4)(a) at that time, did not have "knowingly" in it. It simply read: "It is unlawful for any person to deliver, attempt to deliver, or cause to be delivered a noncontrolled substance. . . ." "Knowingly" was written in after "person" in the above sentence and was included in the statute as enacted.

That same draft had a subsection (c) that was first revised, then deleted entirely, and not included in the statute as enacted. That subsection provided:

> In any prosecution for unlawful delivery of a noncontrolled substance it is no defense that the accused believed the noncontrolled substance to actually be a controlled substance.

It appears likely that the original draft of the statute, which did not include "knowingly" and did not include sub. (c), was patterned after a model or uniform act because it closely resembles some of the statutes involved in the cases cited above. It does not match exactly with the current versions of the various model acts. The biggest difference is the way "knowingly" is used.

Finally, Wisconsin has another statute that seems to apply to the same sort of conduct and which does not include "knowingly." See § 961.41(4)(bm), punished by a fine of up to $500 and imprisonment for up to six months or both. See Wis JI-Criminal 6042.

Given this background and the absence of any case law interpreting the Wisconsin statute [but see State v. Cooper, 127 Wis.2d 429, 380 N.W.2d 383 (Ct. App. 1985), dissent referring to what was then § 161.41(4)(a) but decided on other grounds], the Committee concluded that the plain language of the statute should prevail.