

**6042 DELIVERY OF AN IMITATION CONTROLLED SUBSTANCE:
MISDEMEANOR¹ — § 961.41(4)(bm)**

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to offer to have any controlled substance unlawfully delivered to another person and then to deliver a substance which 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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant offered to have a controlled substance unlawfully delivered to (name recipient).

"Deliver" means to transfer or attempt to transfer something from one person to another.²

(Name controlled substance) is a controlled substance which is unlawful to deliver.³

This element requires that the defendant indicated by words or conduct that the substance was (name controlled substance).⁴

2. The defendant [delivered] [arranged to have delivered]⁵ a substance to (name recipient) that was not a name controlled substance.

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

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 6042 was approved by the Committee in April 2006.

This instruction is for a violation of subsec. (4)(bm) of § 961.41. The statute originally appeared as § 161.41(2m) and was renumbered by 1995 Wisconsin Act 448. It reads as follows:

(4) IMITATION CONTROLLED SUBSTANCES . . . (bm) It is unlawful for any person to agree, consent or offer to lawfully manufacture, deliver , distribute, or dispense any controlled substance to any person, or to offer, arrange or negotiate to have any controlled substance unlawfully manufactured, delivered, distributed or dispensed, and then manufacture, deliver, distribute, or dispense or offer, arrange or negotiate to have manufactured, delivered, distributed or dispensed to any such person a substance which is not a controlled substance.

The penalty is a fine of not more than \$500 or imprisonment for not more than 6 months or both. A very similar offense with a felony penalty is defined in § 961.41(4)(am). See Wis JI-Criminal 6040. That offense requires that the defendant "knowingly" deliver, etc., which is not required for this offense.

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

2. 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.

3. This is the approach typically used in the controlled substance instructions. The statutes specifically list the substances that are "controlled substances"; except for certain statutory exceptions, delivery of any controlled substance is unlawful.

4. This statement is borrowed from Wis JI-Criminal 6040. In the context of this offense, to "offer" to deliver a controlled substance must require some representation that the substance is a "controlled

substance."

5. Choose the alternative supported by the evidence. The Committee concluded that the statute applies where the defendant delivers the substance personally or arranges for another person to deliver the substance.