

**6046 USING A CHILD TO DELIVER A CONTROLLED SUBSTANCE<sup>1</sup> —  
§ 961.455**

**Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime for any person who has attained the age of 17 years to knowingly use a child<sup>2</sup> to deliver 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 five elements were present.

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

1. (Name of child) delivered<sup>3</sup> a substance.

"Deliver" means to transfer or attempt to transfer something from one person to another.<sup>4</sup>

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.
3. (Name of child) was a child, that is, had not attained the age of 18 years at the time of the alleged delivery.

Knowledge of (name of child)'s age by the defendant is not required and mistake regarding (name of child)'s age is not a defense.<sup>5</sup>

4. The defendant knowingly used<sup>6</sup> (name of child) to deliver (name controlled substance).

This requires that the defendant knew that (name of child) delivered a substance to another person and knew that the substance was (name controlled substance).<sup>7</sup>

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.]

5. The defendant had attained the age of 17 years at the time of the alleged delivery.

### **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 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 6046 was originally published in 1990 and revised in 1996. This revision involved a nonsubstantive editorial correction and was approved by the Committee in February 2010.

This instruction is for a violation of § 961.455, created by 1989 Wisconsin Act 121 (effective date: January 31, 1990.)

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.

1. The instruction uses "to deliver" in place of the words of the statute: "for the purpose of violating § 961.41(1)." Section 961.41(1) makes it unlawful for any person to manufacture, distribute, or deliver a controlled substance. The Committee concluded that offenses involving delivery are likely to be the most common and therefore drafted this instruction for delivery cases. For cases involving manufacture, Wis JI-Criminal 6021 may be helpful as a model.

Further, this instruction is drafted for the case where an actual delivery has taken place. But a delivery is apparently not required by the words of § 961.455 which refer to using a child "for the purpose of" violating § 161.41. The plain meaning of that phrase appears to be that it is sufficient if the defendant uses a child for the purpose of delivering a controlled substance, even if there is not an actual delivery. This conclusion is supported by subsection (4) of § 961.455 which provides: "If the conduct described under sub. (1) results in a violation under § 961.41(1), the actor is subject to prosecution and conviction under § 961.41(1) or this section or both." See Wis JI-Criminal 6047, which is drafted for a case where a delivery has not necessarily taken place.

2. The instruction uses "child" as the more understandable equivalent of the statute's reference to persons who "is 17 years of age or under." The third element defines "child" in the more common way – as one who "has not attained the age of 18 years."

3. See note 1, supra.

4. This definition was adapted from that found in § 961.01(6), which reads as follows:

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

5. See § 961.455(2).

6. "Uses" is one of the five verbs used in § 961.455: "... solicits, hires, directs, employs, or uses ..." One of the other terms should be substituted if appropriate in a particular case. Wis JI-Criminal 6047 is drafted for a "soliciting" case where a delivery has not necessarily taken place.

7. For controlled substances cases generally, the defendant must know 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). See the discussion at Wis JI-Criminal 6020, note 3, and Wis JI-Criminal 6000.