

**6053 POSSESSION OF DRUG PARAPHERNALIA: METHAMPHETAMINE
— § 961.573(3)**

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess drug paraphernalia with the primary intent to use the drug paraphernalia to manufacture¹ methamphetamine in violation of Chapter 961 of the Wisconsin Statutes.²

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 possessed an item.

"Possessed" means that the defendant knowingly³ had actual physical control of an item.⁴

ADD THE FOLLOWING PARAGRAPHS THAT ARE
SUPPORTED BY THE EVIDENCE:

[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, the item is in that person's possession, even though another person may also have similar control.]

2. The item in question was drug paraphernalia.

"Drug paraphernalia" means all equipment, products, and materials of any kind that are used, designed for use, or primarily intended for use to manufacture methamphetamine.⁵

3. The defendant possessed drug paraphernalia with the primary intent⁶ to use it to manufacture methamphetamine.

"Intent to manufacture methamphetamine" means that the defendant had the purpose to manufacture methamphetamine.

"Manufacture methamphetamine" means to produce⁷ methamphetamine.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and 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 intent and 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.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS G FELONY AND THERE IS EVIDENCE THAT IT WAS COMMITTED IN THE PRESENCE OF A CHILD WHO WAS 14 YEARS OF AGE OR YOUNGER.⁸

If you find the defendant guilty, you must answer the following question:

1. "Had the defendant attained the age of 18 years at the time of the offense?"

If you answer question 1. "yes," you must answer question 2.

If you answer question 1. "no," do not answer question 2.

2. "Did the defendant commit this offense while in the presence of a child who was 14 years of age or younger?"

Before you may answer a question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 6053 was originally published in 2006. This revision was approved by the Committee in August 2006; it reflects changes made by 2005 Wisconsin Act 263.

This instruction is for the offense defined in § 961.573(3), which prohibits possession of drug paraphernalia with "the primary intent" to use it in connection with methamphetamine. Subsection (3) was created by 1999 Wisconsin Act 129. [Effective date: May 24, 2000]. Basic violations are Class H felonies. The penalty increases to a Class G felony if the statute is violated in the presence of a child who is 14 years of age or younger. The latter was created by 2005 Wisconsin Act 263. [Effective date: April 20, 2006.] Violations of § 961.573(1), the general prohibition on drug paraphernalia, carry a maximum penalty of a fine of not more than \$500 or imprisonment for not more than 30 days or both.

Other drug paraphernalia offenses are defined in § 961.574, manufacture or delivery of drug paraphernalia; § 961.575, delivery of drug paraphernalia to a minor; and § 961.576, advertisement of drug paraphernalia. There are no uniform instructions for those offenses. Section 961.65 defines the offense

of possessing certain substances with intent to manufacture methamphetamine. See Wis JI-Criminal 6065.

1. The instruction is drafted for cases involving "manufacture" because the Committee concluded that "manufacture" is likely to be the most inclusive term. However, the statute applies to "manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack or store methamphetamine" If use of one of the other terms is necessary, the instruction should be modified by substituting that term for "manufacture" throughout and modifying the third element.

2. The reference to "in violation of Chapter 961" is included in the statutory definition of the crime, so it is included here. It is not included in the instruction's statement of the elements of the crime because the Committee concluded that "in violation of Chapter 961" could be addressed in the same way that statutory exceptions are generally treated. (See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.) If the facts raise an issue about being "in violation of Chapter 961" a statement should be added to the second and third elements that indicates the burden is on the State to prove that there was intent to manufacture methamphetamine "in violation of Chapter 961."

3. 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). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

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.

5. This definition is based on the extremely lengthy one provided in § 961.571(1)(a). The definition refers to "primarily intended for use." Subsec. 961.571(2) defines "primarily" as meaning "chiefly or mainly."

Subsection 961.571(1)(b) provides that "drug paraphernalia" excludes:

1. Hypodermic syringes, needles and other objects used or intended for use in parenterally injecting substances into the human body.
2. Any items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products.

[Note: "Parenteral" means "taken into the body or administered in a manner other than through the digestive tract, as by intravenous or intramuscular injection." American Heritage Dictionary of the English Language, 3rd Edition.]

Section 961.572 sets forth a list of twelve factors that "a court or other authority shall consider in addition to all other legally relevant factors" in determining whether an object is drug paraphernalia. It may be helpful to the jury to add something like the following to the instruction:

In determining whether an object is drug paraphernalia, you may consider any of the following:

[list the factors in § 961.572(1) (a) through (L) that apply].

6. This mental element is specifically required by § 961.573(3).

The United States Supreme Court reviewed the mental element required by a federal statute relating to drug paraphernalia in Posters 'N' Things v. United States, 114 S.Ct. 1747 (May 23, 1994). The court focused on the definition of "drug paraphernalia" found in 21 U.S.C. § 857, which, like § 961.571(1)(a), refers to material "primarily intended" for use in ingesting, etc., drugs. The court held that the reference to "primarily intended" in the definition did not serve as the basis for a subjective mental requirement that would apply to the offense of selling drug paraphernalia. Rather, the Court held that all that is required for violations of § 857 is that the defendant "knew that the items at issue are likely to be used with illegal drugs."

The decision in Posters 'N' Things is not directly applicable to interpreting the Wisconsin statute addressed by this instruction. Here, the subjective mental element is stated in § 961.573(3), which defines the crime as possession of drug paraphernalia **with the primary intent** to manufacture, etc., methamphetamine. This specifically requires a subjective mental element; one need not rely on the argument made by the Posters defendant that the reference to "primarily intended" in the definition of drug paraphernalia was the source of such an element.

7. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. If there is a dispute about whether a particular action constitutes "manufacturing," a detailed definition is provided by § 961.01(13):

"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:

- (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
- (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception

for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

8. This material reflects the change made in the penalty provisions of s. 161.573 by 2005 Wisconsin Act 263. [Effective date: April 20, 2006.] The basic penalty is a Class H felony. However, sub. (3)(b)2. provides: "Any person who is 18 years of age or older and who violates par. (a) while in the presence of a child who is 14 years of age or younger is guilty of a Class G felony."

The Committee concluded that this provision identifies two factual matters that must be submitted to the jury: that the defendant is "18 years of age or older"; and, that the offense was committed in the presence of "a child who is 14 years of age or younger."

As with similar penalty-increasing facts, the Committee believes these issues are best handled by submitting them to the jury as two special questions. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of possession of drug paraphernalia, under sec. 161.573(3), at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no."

1. "Had the defendant attained the age of 18 years at the time of the offense?"

If you answer question 1. "yes," you must answer question 2 "yes" or "no."

If you answer question 1. "no," do not answer question 2.

2. "Did the defendant commit this offense while in the presence of a child who was 14 years of age or younger?"