

**6065 POSSESSING MATERIALS FOR MANUFACTURING
METHAMPHETAMINE — § 961.65**

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess (insert name of substance)¹ with intent to manufacture methamphetamine.

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 possessed a substance, (insert name of substance).²

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

**ADD THE FOLLOWING PARAGRAPHS THAT ARE
SUPPORTED BY THE EVIDENCE:**

[A substance 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 substance.]

[It is not required that a person own a substance in order to possess it.

What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.]⁵

2. The defendant possessed (insert name of substance) with intent to manufacture methamphetamine.

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

"Manufacture methamphetamine" means to produce⁶ methamphetamine.

With respect to intent to manufacture methamphetamine, you cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon intent. As part of the circumstances, you may consider the quantity and monetary value of the substance possessed.

[ADD THE FOLLOWING IF THERE IS EVIDENCE OF POSSESSION OF MORE THAN 9 GRAMS OF EPHEDRINE OR PSEUDOEPHEDRINE.]⁷

[Evidence has been received that the defendant possessed more than 9 grams of (ephedrine) (pseudoephedrine).

If you are satisfied beyond a reasonable doubt that the defendant possessed more than 9 grams of (ephedrine) (pseudoephedrine), you may find from this fact alone that the defendant intended to manufacture methamphetamine, but you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant intended to manufacture methamphetamine unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.]

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 6065 was approved by the Committee in October 2005.

Wis JI-Criminal 6065 is drafted for a violation of § 961.65, an offense created by 2005 Wisconsin Act 14. The effective date is June 22, 2005.

1. Insert the name of the substance involved in the case. Those covered by § 961.65 are: "an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia. . . . '[E]phedrine' and 'pseudoephedrine' include any of their salts, isomers, and salts of isomers." § 961.65.

2. Insert the name of the substance involved in the case. Those covered by § 961.65 are: "an ephedrine or pseudoephedrine product, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or pressurized ammonia. . . . '[E]phedrine' and 'pseudoephedrine' include any of their salts, isomers, and salts of isomers." See § 961.65.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious

possession. See Schwartz v. State, 192 Wis. 414-18, 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).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Ibid.

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. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

6. 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. The complete definition in § 961.01(13) is as follows:

"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.

7. The bracketed material implements the "rebuttable presumption of intent to manufacture,"

which is set forth in § 961.65 and stated as follows:

Possession of more than 9 grams of ephedrine or pseudoephedrine, other than pseudoephedrine contained in a product to which s. 961.01(20c)(a) or (b) applies, creates a rebuttable presumption of intent to manufacture methamphetamine.

The approach used in the instruction is the one the Committee has adopted to deal with "rebuttable presumptions" and "prima facie cases" in other situations. See Wis JI-Criminal 225.