

6070 USE OR POSSESSION OF A MASKING AGENT — § 961.69(2)**Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime for a person to use, or possess with the primary intent to use, a masking agent.

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 [used] [possessed with the primary intent to use] a substance or device.

["Possessed" means that the defendant knowingly had a substance or device under his actual physical control.]¹

2. The substance or device was a masking agent.

A masking agent is any substance or device that is intended for use to defraud, circumvent, interfere with, or provide a substitute for a bodily fluid in conjunction with a lawfully administered drug test.²

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 6070 was approved by the Committee in December 2016.

This instruction is for possession or use of a masking agent in violation of § 961.69(2), which was created by 2015 Wisconsin Act 264, effective date: March 19, 2016. Subsection (3) of § 961.69 prohibits delivery, possession with intent deliver, or manufacturing with intent to deliver, a masking agent. Subsection (4) prohibits placing an advertisement to promote the sale of a masking agent. Uniform instructions have not been drafted for violations of subs. (3) and (4).

1. "Possess" is defined in Wis JI-Criminal 920 to require "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

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

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.

2. This is the definition of "masking agent" provided in § 961.69(1).