

**6110 POSSESSION OF A PRESCRIPTION DRUG WITH INTENT TO DELIVER — § 450.11(7)(g)****Statutory Definition of the Crime**

The Wisconsin Statutes make it a crime to possess a prescription drug with intent to deliver.

**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 four elements were present.

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

1. The defendant possessed a substance.

"Possessed" means that the defendant knowingly<sup>1</sup> had actual physical control<sup>2</sup> of a substance.

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.]<sup>3</sup>

2. The substance was a prescription drug.
3. The defendant knew or believed that the substance was a prescription drug.<sup>4</sup>

A prescription drug is a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug.<sup>5</sup>

4. The defendant intended to deliver a prescription drug.

"Deliver" means to transfer or attempt to transfer from one person to another.<sup>6</sup>

"Intended to deliver" means that the defendant had the purpose to deliver.<sup>7</sup>

### **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 of the facts and circumstances in this case bearing upon intent and knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.<sup>8</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four 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 6110 was approved by the Committee in April 2006.

This instruction is drafted for violations of § 450.11(7)(g) and (9)(b). Subsection (9)(c) provides as follows:

In any action or proceeding brought for the enforcement of this section, it shall not be necessary to negate any exception or exemption contained in this section, and the burden of proof of any such exception or exemption shall be upon the defendant.

The instruction does not address any "exceptions or exemptions."

1. 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). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "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."

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

4. This knowledge element is included to be consistent with the other instruction for a "prescription drug" offense – see Wis JI-Criminal 6100, footnote 3.

5. Section 450.01(20)(a) provides that "prescription drug" means "any drug, drug product or drug-containing preparation which is subject to 21 USC 353(b) or 21 CFR 201.105." Sub. (20)(b) of the same statute provides that for purposes of other subsections of § 450.11 certain controlled substances may be considered prescription drugs, but sub. (7) is not one of those subsections.

21 USC 353(b) reads as follows:

- (1) A drug intended for use by man which –
- (A) is a habit-forming drug to which 21 USC § 351(d) applies; or
  - (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
  - (C) is limited by an approved application under 21 USC § 355 to use under the professional supervision of a practitioner licensed by law to administer such drug, shall be dispensed only (I) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such a written or oral prescription if such refilling is authorized by the prescriber . . .

21 CFR 201.105 Veterinary Drugs, reads as follows:

A drug subject to the requirement of section 504(f)(1) of the act shall be exempt from section 502(f) of the act if all the following conditions are met:

(a) The drug is:

- (1)(I) In the possession of a person (or his agents or employees) regularly and lawfully engaged in the manufacture, transportation, storage, or wholesale distribution of drugs that are to be used only by or on the prescription or other order of a licensed veterinarian; or . . .

In the Committee's judgment, these definitions boil down to the one suggested in the instruction: "a drug intended for use by humans or animals that is available only on the prescription of a practitioner licensed to administer that drug."

6. This is based on the definition of "delivery" in sec. 961.01(6).

7. "Intent" is defined in the Criminal Code to require either "mental purpose" or being "aware that (his) (her) conduct was practically certain to cause" the result. The Committee concluded that the "mental purpose" alternative is most likely to apply to this offense. But see, Wis JI-Criminal 923A and 923B.

8. This is based on section 450.11(7)(g), which applies to controlled substance violations and provides as follows with respect to intent to manufacture or deliver:

. . . Intent under this paragraph may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the prescription drug prior to, during and after the alleged violation.