

**25.22 UNLAWFUL DISTRIBUTION OF (NAME(S) OF ENUMERATED
CONTROLLED SUBSTANCE(S)) CAUSING AN OVERDOSE OR [SERIOUS
BODILY INJURY]**

§ 893.131, Fla. Stat.

To prove the crime of Unlawful Distribution of (name(s) of enumerated controlled substance(s)) Causing an Overdose or Serious Bodily Injury, the State must prove the following five elements beyond a reasonable doubt:

- 1. (Defendant) unlawfully distributed (name(s) of enumerated controlled substance(s)).**
- 2. At the time of the distribution, (defendant) had knowledge of the presence of the substance.**
- 3. At the time of the distribution, (defendant) was 18 years of age or older.**
- 4. (Victim) used the (name(s) of enumerated controlled substance(s)) that (defendant) had distributed.**
- 5. The (name(s) of enumerated controlled substance(s)) that (defendant) unlawfully distributed caused or was a substantial factor in causing an overdose or serious bodily injury to (victim).**

“Distribute” means to deliver, other than by administering or dispensing, a controlled substance and includes the direct or indirect delivery of a controlled substance to a user.

“Deliver” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

“Administer” means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a person or animal.

(Name(s) of enumerated controlled substance(s)) [is] [are] [a] controlled substance[s]. It is unlawful to distribute (name(s) of enumerated controlled substance(s)) unless licensed by the State of Florida to do so.*

“Dispense” means the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user.

“Overdose or serious bodily injury” means drug toxicity or a physical condition that creates a substantial risk of death or substantial loss or impairment of the function of any bodily member or organ.

“Substantial factor” means that the use of a substance [or mixture] alone is sufficient to cause an overdose or serious bodily injury, regardless of whether any other substance or mixture used is also sufficient to cause an overdose or serious bodily injury.

Give if applicable.

You may but are not required to infer that a person experienced an overdose or serious bodily injury if you are convinced beyond a reasonable doubt that the person was administered medical care by an emergency responder, including, but not limited to, a law enforcement officer, a paramedic, or an emergency medical technician.

“Medical care” means the administration of treatment for the purposes of preserving or sustaining life or the administration of an emergency opioid antagonist.

“Emergency opioid antagonist” means naloxone hydrochloride or any similarly acting drug that blocks the effects of opioids administered from outside the body and that is approved by the United States Food and Drug Administration for the treatment of an opioid overdose.

Affirmative defense: Lack of knowledge of illicit nature. Give if applicable.
§ 893.101(2) and (3), Fla. Stat.

Lack of knowledge of the illicit nature of a controlled substance is a defense to the crime charged.

You may but are not required to infer that (defendant) knew of the illicit nature of the controlled substance if you find that [he] [she] possessed the controlled substance.

To prove (defendant) “possessed a substance,” the State must prove beyond a reasonable doubt that [he] [she] a) knew of the existence of the substance and b) intentionally exercised control over that substance.

Give if applicable.

Control can be exercised over a substance whether the substance is carried on a person, near a person, or in a completely separate location. Mere proximity to a substance does not establish that the person intentionally exercised control over the substance in the absence of additional evidence. Control can be established by proof that (defendant) had direct personal power to control the substance or the present ability to direct its control by another.

Joint possession. Give if applicable.

Possession of a substance may be sole or joint, that is, two or more persons may possess a substance.

If you are convinced beyond a reasonable doubt that (defendant) **knew of the illicit nature of the controlled substance, and if all of the elements of the charge have been proved, you should find [him] [her] guilty of the crime charged.**

If you have a reasonable doubt on the question of whether (defendant) **knew of the illicit nature of the controlled substance, you should find [him] [her] not guilty of the crime charged.**

Lesser Included Offense**

UNLAWFUL DISTRIBUTION OF (NAME(S) OF ENUMERATED CONTROLLED SUBSTANCE(S)) CAUSING AN OVERDOSE OR SERIOUS BODILY INJURY — 893.131

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS.NO.
Delivery of a controlled substance		893.13	25.2

Comments

The instruction indicates that the State must prove the defendant unlawfully distributed the enumerated controlled substance. However, as of April 2024, there was no case law that determined whether the State must prove the distribution was unlawful, or whether the defendant must provide evidence, as an affirmative defense, that the distribution was lawful. If lawfulness of the distribution (e.g., defendant was licensed in Florida to distribute the controlled substance) is an affirmative defense, the trial judge must determine which party has the burden of persuasion and what that burden is (preponderance of the evidence, clear and convincing, or beyond a reasonable doubt).

*A special instruction will be necessary if the defendant was licensed to distribute the enumerated controlled substance but did so in an unlawful manner. Trial judges can review §§ 893.05 and 893.13(8), Fla. Stats. to define an unlawful manner.

**As of April 2024, it is unclear whether Possession of a Controlled Substance is a lesser included offense. In *State v. McCloud*, 577 So. 2d 939 (Fla. 1991), the Court held that possession of a controlled substance was not a lesser of Sale of a Controlled Substance.

A person who violates § 893.131(2)(a), Fla. Stat., commits a second degree felony. However, a person who has a prior conviction for the same crime commits a first degree felony. As of April 2024, it was unclear whether the fact of a prior conviction is an element that must be proven to the jury or is a recidivist fact that can be proven to the judge at sentencing under a preponderance of the evidence standard.

If treated as an element, it is error to inform the jury of a prior conviction. Therefore, if the information or indictment contains an allegation of a prior conviction, do not read the allegation and do not send the information or indictment into the jury room. If the defendant is found guilty, the historical fact of a prior conviction must be determined beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

This instruction was adopted on May 21, 2024.