

**25.6 SELL, MANUFACTURE, DELIVER, OR POSSESSION WITH INTENT TO
SELL, MANUFACTURE OR DELIVER A CONTROLLED SUBSTANCE IN
SPECIFIED LOCATIONS**

§ 893.13(1)(c)–(f) and (h), Fla. Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Specific substance alleged) **is a controlled substance.**

To prove the crime of (crime charged), **the State must prove the following four elements beyond a reasonable doubt:**

1. (Defendant) **[sold] [manufactured] [delivered] [possessed with intent to [sell] [manufacture] [deliver]] a certain substance.**

Give as applicable. § 893.13(1)(c)–(f) and (h), Fla. Stat. To explain the specified locations, the judge should provide definitions (see below) from the appropriate statutes that are referred to in § 893.13(1), Fla. Stat.

2. **The [sale] [manufacture] [delivery] [possession with intent to [sell] [manufacture] [deliver]] took place in, on, or within 1,000 feet of:**

the real property comprising a child care facility;

the real property comprising a public or private [elementary] [middle] [secondary] school between the hours of 6:00 a.m. and 12:00 midnight;

the real property comprising [a state, county, or municipal park] [a community center] [a publicly-owned recreational facility];

the real property comprising a public or private college, university, or other postsecondary educational institution;

a physical place for worship at which a church or religious organization regularly conducts religious services;

a convenience business;

[the real property comprising a public housing facility];

the real property comprising a mental health facility;

the real property comprising a health care facility licensed under chapter 395, Florida Statutes, that provides substance abuse treatment;

the real property comprising a licensed service provider;

the real property comprising a facility providing services that include clinical treatment, intervention, or prevention;

the real property comprising a recovery residence;

the real property comprising an assisted living facility;

the real property comprising a pain management clinic.

- 3. The substance was** (specific substance alleged).
- 4. (Defendant) had knowledge of the presence of the substance.**

Sell.

“Sell” means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Manufacture. § 893.02(15)(a), Fla. Stat.

“Manufacture” means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container.

The term “manufacture” does not include the preparation, compounding, packaging, or labeling of a controlled substance by:

- 1. A practitioner or pharmacist as an incident to his or her administering or delivering of a controlled substance in the course of his or her professional practice.**
- 2. A practitioner, or by his or her 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.**

Deliver. § 893.02(6), Fla. Stat.

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

Possession.

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.

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.

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

*Give if applicable. See *McMillon v. State*, 813 So. 2d 56 (Fla. 2002).*

You may but are not required to infer that a person who sells a controlled substance knows of its illicit nature.

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

Define appropriate specified location(s) here. See § 893.13(1), Fla. Stat., for statutory cites for location definitions.

Lesser Included Offenses

SELL, MANUFACTURE, DELIVER, OR POSSESSION WITH INTENT TO SELL, MANUFACTURE OR DELIVER A CONTROLLED SUBSTANCE IN SPECIFIED LOCATIONS — 893.13(1)(c)–(f) AND (h)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
*Sale, Manufacture, or Delivery of a controlled substance, if Sale, Manufacture, or Delivery is charged		893.13(1)(a)	25.2
*Possession of a Controlled Substance, if Possession with Intent to Sell, Manufacture, or Deliver is charged		893.13(6)	25.7

Comments

*The crime of Possession of a Controlled Substance is not a necessarily lesser-included crime of Manufacture of a Controlled Substance. *Anderson v. State*, 447 So. 2d 236 (Fla. 1st DCA 1983). Also, Possession of a Controlled Substance is not a

necessary lesser-included offense of Sale of a Controlled Substance. *State v. McCloud*, 577 So. 2d 939 (Fla. 1991). It is unclear if the courts will determine that a person charged with Delivery of a Controlled Substance is necessarily charged with Possession of a Controlled Substance.

Starting in 2014, the Legislature passed laws pertaining to “medical cannabis” or “low-THC cannabis,” which is excluded from the definition of “cannabis” in § 893.02(3), Fla. Stat.; is defined in § 381.986(1), Fla. Stat.; and must be manufactured, possessed, sold, purchased, delivered, distributed, or dispensed in conformance with § 381.986, Fla. Stat. A special instruction will be necessary in cases where a defendant relies on a cannabis-related prescription defense.

Child care facility; affirmative defense. § 893.13(1)(c), Fla. Stat., requires the owner or operator of a child care facility to post a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that the sign be posted on the property of the facility in a conspicuous place where it is reasonably visible to the public. According to *Brevil v. State*, 326 So. 3d 1129 (Fla. 4th DCA 2021), the absence of such a sign is an affirmative defense. Therefore, the defendant must meet his or her burden of production of non-compliance with the statutory signage requirements. As of November 2022, there is no case law that establishes which party has the burden of persuasion for the affirmative defense and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt). Until there is a statutory change or case law, trial judges will need to draft a special instruction that addresses these issues.

This instruction was adopted in 1981 and amended in 1989 [543 So. 2d 1205], 1997 [697 So. 2d 84], 2000 [765 So. 2d 692], 2007 [969 So. 2d 245], 2014 [153 So. 3d 192], 2016 [191 So. 3d 291], 2017 [216 So. 3d 497], 2019 [272 So. 3d 243], on December 15, 2021, and on December 21, 2022.