

25.7(a) TRAFFICKING IN (NAME OF CONTROLLED SUBSTANCE)

§ 893.135(1), Fla. Stat.

Certain drugs and chemical substances are by law known as “controlled substances.” (Name of controlled substance) is a controlled substance.

To prove the crime of Trafficking in (name of controlled substance), the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) knowingly [possessed] [sold] [purchased] [manufactured] [delivered] [brought into Florida] a substance.**
- 2. The substance was [(name of controlled substance)] [a mixture containing (name of controlled substance)].**
- 3. The [(name of controlled substance)] [mixture containing (name of controlled substance)] weighed [(insert weight alleged)].**

If applicable under the facts of the case and pursuant to § 893.135(2), Fla. Stat., instructions on the following elements 1 and 2 should be given instead of elements 1 and 2 above. For example, if it is alleged that the defendant intended to sell heroin but actually sold cocaine, instructions on elements 1 and 2 below would be given.

- 1. (Defendant) intended to [possess] [sell] [purchase] [manufacture] [deliver] [bring into Florida] (a controlled substance enumerated in § 893.135(1), Fla. Stat.).**
- 2. The defendant actually [possessed] [sold] [purchased] [manufactured] [delivered] [brought into Florida] (a controlled substance enumerated in § 893.135(1), Fla. Stat.).**

Definitions. Give as applicable.

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.

Give if applicable.

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.

Mixture. § 893.02(16), Fla. Stat.

“Mixture” means any physical combination of two or more substances, including, but not limited to, a blend, an aggregation, a suspension, an emulsion, a solution, or a dosage unit, whether or not such combination can be separated into its components by physical means, whether mechanical or thermal.

Possession.

To prove (defendant) knowingly 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.

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 Trafficking in (name of controlled substance). 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. 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 Trafficking in (name of controlled substance).

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 Trafficking in (name of controlled substance).

State v. Weller, 590 So. 2d 923 (Fla. 1991).

If you find the defendant guilty of Trafficking in (name of controlled substance), you must further determine by your verdict whether the State has further proved beyond a reasonable doubt that:

§ 893.135(1) Fla. Stat. contains differing weights and associated penalties for various controlled substances. Give if applicable, as determined by the date of the offense, up to the weight charged.

- a. **the [(name of controlled substance)] [mixture containing (name of controlled substance)] weighed [(insert weight)] but less than [(insert weight)].**
- b. **the [(name of controlled substance)] [mixture containing (name of controlled substance)] weighed [(insert weight)] but less than [(insert weight)].**
- c. **the [(name of controlled substance)] [mixture containing (name of controlled substance)] weighed [(insert weight)] but less than [(insert weight)].**

Lesser Included Offenses

Trafficking can be committed by possession, sale, purchase, manufacture, delivery, or by bringing into this state a certain amount of drugs. Accordingly, before deciding the appropriate lesser-included offenses, trial judges should review not only the evidence but also the charging document to see what type of trafficking was alleged. For example, if a defendant is charged only with Trafficking via Sale, then Possession of a Controlled Substance should not be given as a lesser-included offense because of *State v. McCloud*, 577 So. 2d 939 (Fla. 1991) (holding that possession of cocaine is not a lesser-included offense of sale of cocaine). Also, there is no crime of Attempted Delivery because the definition of “delivery” in § 893.03(6), Fla. Stat., includes the attempt to transfer from one person to another.

Comments

One way to commit Trafficking in Cannabis is to knowingly possess, sell, purchase, manufacture, deliver, or bring into the state 300 or more cannabis plants. Also, the trafficking statute for some of the controlled substances include not only the controlled substance or a mixture containing that controlled substance, but also a salt, derivative, isomer, salt of an isomer, analog, substituted controlled substance, ester, ether, salt of an ester, or salt of an ether of that controlled substance. A special instruction is needed in those cases.

There is no crime of attempted conspiracy. *Hutchinson v. State*, 315 So. 2d 546 (Fla. 2d DCA 1975).

This instruction was adopted in 2019.