

25.9 SALE, MANUFACTURE, DELIVERY, OR POSSESSION WITH INTENT TO SELL, MANUFACTURE, OR DELIVER [FENTANYL] [INSERT RELEVANT SUBSTANCE]

§ 893.13(1)(i), Fla. Stat.

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.**
- 2. The substance was [(insert relevant substance listed in § 893.13(1)(i) 1.a.-f., Fla. Stat.)] [a mixture containing (insert relevant substance listed in § 893.13(1)(i) 1.a.-f., Fla. Stat.)].**
- 3. The [substance] [mixture] was in a form that resembled, or was mixed, granulated, absorbed, spray-dried, or aerosolized as or onto, coated on, in whole or in part, or solubilized with or into, a product, when such product or its packaging further had at least one of the following attributes:**
 - a. Resembled the trade dress of a branded food product, consumer food product, or logo food product; or,**
 - b. Incorporated an actual or fake registered copyright, service mark, or trademark; or,**
 - c. Resembled candy, cereal, a gummy, a vitamin, or a chewable product, such as a gum or gelatin-based product; or,**
 - d. Contained a cartoon character imprint.**
- 4. (Defendant) had knowledge of the presence of the substance.**

Definitions. § 893.02, Fla. Stat. Give if applicable.

“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.

“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” 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” 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. The Court instructs you that (insert relevant substance listed in § 893.13(1)(i) 1.a.-f., Fla. Stat.) is a controlled substance.

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.

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 (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).

Lesser Included Offenses

SALE, PURCHASE, MANUFACTURE, DELIVERY, OR POSSESSION WITH INTENT TO SELL, MANUFACTURE, OR DELIVER [FENTANYL] [RELEVANT CONTROLLED SUBSTANCE] — 893.13(1)(i)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
*Possession of a Controlled Substance, if Possession with Intent is charged		893.13(6)	25.7
	Attempt, except when delivery is charged	777.04(1)	5.1

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 Purchase or Delivery of a Controlled Substance is necessarily charged with Possession of a Controlled Substance.

There is no crime of Attempted Delivery because the definition of “delivery” in § 893.02(6), Fla. Stat. includes the attempt to transfer from one person to another.

This instruction was adopted on March 8, 2024.