

POSSESSION OF AN IMITATION CONTROLLED DANGEROUS SUBSTANCE
WITH INTENT TO DISTRIBUTE
(N.J.S.A. 2C:35-11)

Count _____ of the indictment charges the defendant as follows:

(Read Indictment)

The pertinent part of the statute (N.J.S.A. 2C:35-11) on which this indictment is based reads as follows:

- a. It is unlawful for any person . . . to possess or have under his control with intent to distribute any substance which is not a controlled dangerous substance or controlled substance analog:

[Read Appropriate Section or Section of the Statute]¹

- (1) Upon the express or implied representation to the recipient that the substance is a controlled dangerous substance [or controlled substance analog]; or
- (2) Upon the express or implied representation to the recipient that the substance is of such nature, appearance or effect that the recipient will be able to distribute or use the substance as a controlled dangerous substance [or controlled substance analog]; or
- (3) Under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance [or controlled substance analog].

The statute, read together with the indictment, identifies the elements which the State must prove beyond a reasonable doubt to establish guilt of the defendant on this (count of the) indictment. They are as follows:

1. S _____ in evidence is not a controlled dangerous substance or controlled substance analog.
2. A. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is a controlled dangerous substance, specifically (e.g., cocaine).

¹ The statute provides that this offense may be committed in three ways; that is by representation that the substance is a CDS, by representation that the substance can be used or distributed as a CDS, and under circumstances under which a reasonable person would believe the substance to be a CDS. The circumstances of the case will determine which one (or more) of these sections should be charged.

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or

- B. The defendant made an expressed or implied representation to the recipient that S ____ in evidence is of such nature, appearance or effect that the recipient will be able to distribute or use S ____ in evidence as a controlled dangerous substance, specifically (e.g., cocaine).

or

- C. The defendant possessed or had under his/her control with intent to distribute S ____ in evidence under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance, specifically (e.g., cocaine).

3. The defendant possessed, or had under his/her control, S ____ in evidence.
4. The defendant, when he/she possessed or had under his/her control S ____ in evidence, had the intent to distribute S ____ in evidence.

As I have stated, the first element is that S ____ in evidence is not a controlled dangerous substance or controlled substance analog. Controlled dangerous substances are defined in another part of our law. A controlled substance analog is a substance that (1) has a chemical structure substantially similar to that of a controlled dangerous substance and (2) was specifically designed to produce an effect substantially similar to that of a controlled dangerous substance.² You have heard testimony in this case that S ____ in evidence is _____. It is, of course, up to you to determine whether this testimony is credible. However, I instruct you that _____ is not a controlled dangerous substance. You have also heard testimony that _____ is not a controlled substance analog in that it would not produce an effect substantially similar to that of a controlled dangerous substance and that it was not specifically designed to produce such an effect. Again, it is solely up to you to determine whether this testimony is credible.

In regard to the second element as I have instructed you, you must decide whether the State has proven beyond a reasonable doubt (charge appropriate section or sections):
That either:

- A. The defendant made an expressed or implied representation

² N.J.S.A. 2C:35-2.

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to the recipient that S ____ in evidence is a controlled dangerous substance, specifically (e.g., cocaine).

or

- B. The defendant made an expressed or implied representation to the recipient that S ____ in evidence is of such nature, appearance or effect that the recipient will be able to distribute or use S ____ in evidence as a controlled dangerous substance, specifically (e.g., cocaine).

or

- C. The defendant possessed or had under his/her control with intent to distribute S ____ in evidence under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance, specifically (e.g., cocaine).

[In determining whether the circumstances were such as to lead a reasonable person to believe that S ____ is a controlled dangerous substance, specifically (e.g., cocaine), you should of course consider all the evidence including whether S ____ was packaged in a manner normally used for the unlawful distribution of controlled dangerous substances; whether any distribution or attempted distribution of S ____ was accompanied by an exchange of or demand for money or other thing as consideration for S _____ and the value of the consideration exceeded the reasonable value of S ____ and whether the physical appearance of S ____ is substantially the same as that of a specific controlled dangerous substance.³]

[Note: When it is charged that the substance is an imitation of a controlled dangerous substance analog, the following charge, rather than the one set forth above, should be given as the instruction on the second element of the offense.]

In regard to the second element as I have instructed you, you must decide whether the State has proven beyond a reasonable doubt [charge appropriate section or sections]:

- A. The defendant made an expressed or implied representation to the recipient that S ____ in evidence is a controlled substance analog, i.e. the defendant expressly or impliedly

³ N.J.S.A. 2C:35-11a(3)(a) through (c). This language only should be charged when the third alternative is applicable.

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represented that S ____ in evidence has a chemical structure substantially similar to (e.g. cocaine) and that S ____ in evidence was specifically designed to produce an effect substantially similar to that of (e.g. cocaine).

or

- B. The defendant made an expressed or implied representation to the intended recipient that S ____ is of such a nature or effect that the recipient will be able to distribute or use S ____ in evidence as a controlled substance analog, i.e. the defendant expressly or impliedly represented that the recipient will be able to distribute or use S ____ as a substance that has a chemical structure substantially similar to (e.g. cocaine) and as a substance that was specifically designed to produce an effect substantially similar to (e.g. cocaine).

or

- C. The defendant possessed or had under his/her control with intent to distribute S ____ in evidence under circumstances which would lead a reasonable person to believe that the S ____ in evidence is a controlled substance analog, i.e. that S ____ in evidence is a controlled structure substantially similar to that of (e.g. cocaine) that S ____ in evidence was specifically designed to produce an effect substantially similar to (e.g. cocaine).

[In determining whether the circumstances were such as to lead a reasonable person to believe that S ____ is a controlled substance analog, you should, of course, consider all the evidence, including whether S ____ was packaged in a manner normally used for the unlawful distribution of controlled dangerous substances or controlled substance analogues; whether any distribution or attempted distribution of S ____ was accompanied by an exchange of or demand for money or other thing as consideration for S ____, and the value of the consideration exceeded the reasonable value of S ____; and whether the physical appearance of S ____ is substantially the same as that of a specific controlled dangerous substance or controlled substance analog.⁴

⁴ N.J.S.A. 2C:35-11A(3)(A) through (C). This language only should be charged when the third alternative is applicable.

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In regard to the third element, that the defendant possessed or had under his/her control S ____ in evidence, "possess" means (charge definition of possession).

It should be noted that the law provides that it shall not be a defense that the defendant mistakenly believed a substance to be a controlled dangerous substance [or controlled substance analog].⁵ Thus, if you were to find that the defendant exercised or intended to exercise control over S ____ in evidence but mistakenly believed that S ____ in evidence was a controlled dangerous substance [or controlled substance analog], the defendant's mistaken belief as to the character of S ____ in evidence would not prevent you from finding that he/she knowingly possessed S ____ in evidence.

In regard to the fourth element, that the defendant had the intent to distribute S ____ in evidence, "distribute" means the transfer, actual, constructive or attempted, from one person to another of an item.⁶ The intent must refer to the defendant's purpose to distribute S ____ (the imitation controlled dangerous substance) and not merely to possess the item(s).⁷ It is not necessary that the item be transferred in exchange for payment or promise of payment of money or anything of value.⁸

"Intent" means a purpose to do something, a resolution to do a particular act or accomplish a certain thing. Intent is a state of mind, and it is very rare that intent is proven by witnesses who can testify that an accused said he/she had a certain intent when he/she engaged in a particular act. The intention may be gathered from a person's act, conduct, from all the person said and did at the particular time and place, and from all of the surrounding circumstances.

You may consider any evidence as to the quantity and packing of S ____ together with all of the other evidence in the case to aid you in your determination of the element of intent to distribute.⁹

To reiterate, the four elements of this offense are that:

1. S ____ in evidence is not a controlled dangerous substance or controlled dangerous analog.
2. A. The defendant made an expressed or implied

⁵ N.J.S.A. 2C:35-11c.

⁶ This definition is taken from the definitions of "distribute" and "deliver" set forth in N.J.S.A. 2C:35-2.

⁷ State v. Gregory, 220 N.J. 413, 417, 421 (2015).

⁸ State v. Heitzman 209 N.J.Super. 617, 621 (App. Div. 1986), aff'd 107 N.J. 603 (1987).

⁹ State v. Perez, 218 N.J.Super. 478, 482-486 (App. Div. 1987).

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representation to the recipient that S _____ in evidence is a controlled dangerous substance, specifically (e.g., cocaine)

or

- B. The defendant made an expressed or implied representation to the recipient that S _____ in evidence is of such nature, appearance or effect that the recipient will be able to distribute or use S _____ in evidence as a controlled dangerous substance, specifically (e.g., cocaine).

or

- C. Defendant possessed or had under his/her control with intent to distribute S _____ in evidence under circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance, specifically (e.g., cocaine).

3. The defendant possessed or had under his/her control, S_____ in evidence; and
4. The defendant had the intent to distribute S _____ in evidence.

If you find that the State had proven all these elements beyond a reasonable doubt, then you must return a verdict of guilty. On the other hand, if you find the State has failed to prove any of these elements beyond a reasonable doubt, then you must return a verdict of not guilty.