

910 DANGEROUS WEAPON — § 939.22(10)

"Dangerous weapon" means¹

[any firearm, whether loaded or unloaded. A firearm is a weapon that acts by force of gunpowder.²]³

[any device designed as a weapon and capable of producing death or great bodily harm.

"Great bodily harm" means serious bodily injury.⁴]⁵

[any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood.]⁶

[any electric weapon. An electric weapon is a device designed or used to immobilize or incapacitate a person by the use of electric current.]⁷

[any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.⁸]⁹

COMMENT

Wis JI-Criminal 910 was originally published in 1989 and revised in 1993, 1994, 1996, 2000, 2002, and 2009. This revision was approved by the Committee in October 2011; it updated the comment to reflect 2011 Wisconsin Act 35.

This instruction is intended to provide a basic definition of "dangerous weapon." Its substance is incorporated into instructions for offenses having "dangerous weapon" as an element. The comment here contains a more complete discussion of the substantive issues relating to the definition.

Section 939.22(10) reads as follows, as amended by 2011 Wisconsin Act 35:

"Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede partially or completely, breathing or circulation of blood; any electric weapon, as defined in § 941.295(1c)(a); or any other

device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

The Comment in the 1953 Judiciary Committee Report on the Criminal Code explains the statutory definition as follows:

A firearm is treated as a dangerous weapon whether or not it is loaded. It often is very difficult to prove that a weapon was loaded unless it was actually fired. Furthermore, from the standpoint of safety it is desirable to treat an unloaded firearm the same as a loaded one, for there are numerous occasions when "unloaded" firearms have discharged with disastrous results. Things like blackjacks and brass knuckles are dangerous weapons per se. They are designed as weapons and have few, if any, lawful uses. As to other devices or instrumentalities, their classification as dangerous weapons must depend on the manner in which they are used or intended to be used rather than on their inherent dangerousness. Automobiles, baseball bats, acid and razors are items ordinarily used for lawful purposes. However, they may be just as lethal as firearms or blackjacks if they are used in a manner calculated or likely to produce death or great bodily harm. If so found, or if intended to be so used, they fall within the definition of "dangerous weapon."

1. Choose the alternative supported by the evidence.
2. Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).
3. See discussion of loaded and unloaded firearms in this comment preceding note 1.

Air guns do not qualify as firearms under this definition but may be dangerous weapons as "devices designed as a weapon and capable of producing death or great bodily harm," or, when used as a bludgeon, as a "device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." See Rafferty v. State, 29 Wis.2d 470, 138 N.W.2d 741 (1966); and Boyles v. State, 46 Wis.2d 473, 175 N.W.2d 277 (1970). Also see State v. Antes, 74 Wis.2d 317, 246 N.W.2d 671 (1976). Rafferty was cited in support of the conclusion that a "BB" air pistol is a dangerous weapon in In Interest of Michelle A.D., 181 Wis.2d 917, 512 N.W.2d 248 (Ct. App. 1994).

4. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. See Wis JI-Criminal 914 for a complete discussion of that term, as defined in § 939.22(14).

5. This alternative is intended to apply to items designed as weapons, such as blackjacks or brass knuckles. See this comment preceding note 1. Such items must be capable of producing death or great bodily harm. This category can be applied to air guns. See note 3, supra.

6. This alternative was added to the definition in § 939.22(10) by 2007 Wisconsin Act 127. [Effective date: April 4, 2008.]

7. The definition of electric weapon is adapted from the one provided in § 941.295(1c)(a), which reads as follows:

In this section, "electric weapon" means any device which is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.

8. See note 4, supra.

9. This is the broadest category under the statute and can extend to virtually any "device or instrumentality" capable of producing death or great bodily harm. The Wisconsin Supreme Court has held that large soft drink bottles can qualify as dangerous weapons under this part of the definition. See Langston v. State, 61 Wis.2d 288, 293, 212 N.W.2d 113 (1973). The same is true with regard to a bottle of nitroglycerine. Beamon v. State, 93 Wis.2d 215, 219, 286 N.W.2d 592 (1980). Also see this comment preceding note 1. A "BB" air pistol is a dangerous weapon under this category. See note 3, supra.

In State v. Sinks, 168 Wis.2d 245, 483 N.W.2d 286 (Ct. App. 1992), the court of appeals held that a dog could qualify as a dangerous weapon under the "instrumentality" alternative. The court found the plain language of the statute "sufficiently broad to include animate, as well as inanimate, objects." 168 Wis.2d 245, 253.

In State v. Bodoh, 226 Wis.2d 718, 736, 595 N.W.2d 330 (1999), the Wisconsin Supreme Court relied on Sinks and the definition of § 939.22(10) to hold that "a dog can be a dangerous weapon if it is used or intended to be used in a manner calculated or likely to cause death or great bodily harm." The decision emphasized:

. . . It is the manner in which the dog is used and the nature of the act that is determinative of whether the dog is a dangerous weapon. . . . We must . . . determine whether there was sufficient evidence presented to the jury to prove that Bodoh used or intended to use his two Rottweiler dogs in a manner so as to produce death or great bodily harm.

226 Wis.2d 718, 726-27.

The Committee concluded that in cases like Sinks and Bodoh, a tailored instruction would be more helpful than providing only the abstract statutory definition. The Committee recommends adding something like the following:

In this case, the state claims that the dogs were dangerous weapons. Dogs can be dangerous weapons but only if the defendant used or intended to use them in a manner likely to cause great bodily harm or death.

In State v. Frey, 178 Wis.2d 729, 505 N.W.2d 786 (Ct. App. 1993), the court of appeals concluded that the defendant's bare hands are not "instrumentalities" under § 939.22(10). The court found that while the statutory language was ambiguous, there were several reasons for excluding parts of the accused's anatomy: (1) an undefined standard would be presented to the jury; (2) aggravated use of body parts can be accommodated by the penalty provisions that already increase penalties where serious injury is caused; and (3) the "rule of lenity" should be applied where a statute is ambiguous.

[The previous version of this instruction reached the same conclusion. The explanation of the Committee's decision has been dropped from this footnote in light of Frey.]

In State v. Bidwell, 200 Wis.2d 200, 206, 546 N.W.2d 507 (Ct. App. 1996), the court held that a motor vehicle could qualify as a "dangerous weapon" as "an instrumentality which, in the manner it was used, was likely to produce death or great bodily harm." Thus, it was proper to enhance Bidwell's sentences for second degree reckless homicide and second degree reckless injury with the "while armed" provision of § 939.63. The court cautioned that this should be reserved for "the most egregious circumstances" and found they were present in this case: ". . . a drunk driver who operated his car recklessly for miles in heavy traffic near the City of Kenosha in mid-day with a blood/alcohol level twice the legal limit. . . . [He] was fully aware of the risk as he had been arrested for drunken and reckless driving several times in the past." 200 Wis.2d 200, 206, at note 2.

A potential problem in instructing on this part of the definition of dangerous weapon is illustrated by State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. Tomlinson was charged with being party to the crime of first degree reckless homicide while using a dangerous weapon. In instructing on the dangerous weapon penalty enhancer the court stated: "'Dangerous weapon' means a baseball bat." The supreme court held that the instruction was error, concluding that it created a "mandatory conclusive presumption because it requires the jury to find that Tomlinson used a 'dangerous weapon' . . . if it first finds . . . that he used a baseball bat." 2002 WI 91, 162.

Using Wis JI-Criminal 910 for the alternative involved in that case would result in the following:

"Dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

If instructing the jury in terms tailored to the facts of the case is believed to be desirable, a different approach for a baseball bat case might be as follows:

The state alleges that a baseball bat was a dangerous weapon. A baseball bat may be considered to be a dangerous weapon if, in the manner it was used, it was calculated or likely to produce death or great bodily harm.