990A USING OR POSSESSING A DANGEROUS WEAPON: PARTY TO A CRIME — § 939.63

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint)[1] alleges not only that the crime of (insert alleged crime) was committed but also that it was committed while (using) (threatening to use) (possessing) a dangerous weapon.

If you find the defendant guilty, you must answer the following question:

"Was the crime of (insert alleged crime) committed while (using) (threatening to use) (possessing)[2] a dangerous weapon?"

"Dangerous weapon" means[3]

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

[any device designed as a weapon and capable of producing death or great bodily harm. "Great bodily harm" means serious bodily injury.]

[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.][4]

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

Before you may answer this question "yes," you must be satisfied beyond a reasonable

doubt that the crime was committed while [(using) (threatening to use) a dangerous weapon.] [possessing a dangerous weapon and possessed the dangerous weapon to facilitate the crime.][5]

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 990A was approved by the Committee in June 2024.

This instruction was drafted to address situations in which a defendant has been charged as a party to a crime for the offense of using or possessing a dangerous weapon as provided in § 939.63. For violations of § 939.63 not concerning a PTAC charge, see Wis JI Criminal 990.

See Wis JI-Criminal 910 for a complete definition of "dangerous weapon" and a discussion of relevant case law.

Section 939.63 was revised by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The basic penalty-enhancing provision was retained, but subs. (2) and (3), which provided for a "presumptive minimum sentence," were repealed. After revision, § 939.63(1) provides for the following increased penalties if a person commits a crime specified under chapters 939 to 951 and 961 while possessing, using, or threatening to use a dangerous weapon.

(a) The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.
(b) If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years. [This applies to felonies in Classes A through H.]
(c) If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years. [There are no classified felonies with a maximum of more than 2 years, but not more than 5 years.]
(d) The maximum term of imprisonment for a felony not specified in par. (b) or (c) may be increased by not more than 3 years. [This applies to Class I felonies, which have a maximum term of imprisonment of 3 years and 6 months.]

Section 973.01(2)(c), as created by 2001 Wisconsin Act 109, specifies the order in which penalty

enhancement statutes are to be applied, including § 939.63.

The increased penalty provided by this statute does not apply if possessing, using, or threatening to use a dangerous weapon is an essential element of the crime charged. Section 939.63(2). In State v. Robinson, 140 Wis.2d 673, 412 N.W.2d 535 (Ct. App. 1987), the court of appeals held that the "possessing a dangerous weapon" penalty enhancer found in § 939.63 can be applied to the offense of (unarmed) robbery under § 943.32(1). Apparently, confusion on the part on the victim about exactly when Robinson pulled out the gun led the prosecutor to elect this charging scheme instead of simply charging armed robbery. The court found no ambiguity in the statute: § 939.63(1)(b), 1987 Wis. Stats., provides that the dangerous weapon penalty increase applies as long as possessing or using a weapon is not an essential element of the crime charged. This does not result in any conflict with the definition of armed robbery, because the two statutes apply to different conduct. Armed robbery requires using or threatening to use the dangerous weapon. Section 939.63 is violated if a person merely possesses a dangerous weapon during a crime.

Applying § 939.63 to a misdemeanor does not change the misdemeanor to a felony, and no preliminary examination is required. State v. Denter, 121 Wis.2d 118, 357 N.W.2d 555 (1984).

1. The prosecutor's intention to seek the enhanced penalty authorized by § 939.63 should be disclosed by alleging the use of a weapon in the information or complaint. Section 939.63 may not be applied to any offense which has as an element the use or possession of a dangerous weapon.

2. See Wis JI Criminal 920 for a definition of "possession."

3. Choose the alternative supported by the evidence. They are based on the definition of "dangerous weapon" provided in § 939.22(10). See Wis JI-Criminal 910 for footnotes discussing each alternative.

4. A potential problem in instructing on this part of the definition of a 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, ¶62.

Wis JI-Criminal 990 was revised after Tomlinson to include all the statutory alternatives in the text of the instruction. Using 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.

5. This alternative is intended to reflect the decision in State v. Peete, 185 Wis.2d 4, 517 N.W.2d 149 (1994), where the Wisconsin Supreme Court held that a "nexus" must be established between the predicate offense and the "possession" of a dangerous weapon before the penalty enhancer in § 939.63 can apply. Further, the jury must be instructed on the nexus.

Police executed a search warrant at the home of Peete's girlfriend. They found cocaine, cash, a beeper, and Peete's clothes in one of the bedrooms. A loaded handgun was found stuffed between the mattresses in that bedroom. Three other handguns were found in a cereal box in the kitchen pantry. Peete was charged with possession of cocaine with intent to deliver while possessing a dangerous weapon. He was convicted and appealed.

The court first held that "possession" includes "constructive possession" and cited the definition in Wis JI-Criminal 920 with approval.

The court also held that § 939.63 is intended to apply only where there is a relationship or "nexus" between the weapon and the substantive crime. Further, the jury must be instructed on this requirement. The court adopted a definition offered by the state:

> when a defendant is charged with committing a crime while possessing a dangerous weapon . . . the state should be required to prove that the defendant possessed the weapon to facilitate commission of the predicate offense.

185 Wis.2d 4, 18.

The court held that the "nexus" is always present where the offense involves using or threatening to use a weapon. Further definition is needed only in "possessing" cases.

Peete did not offer a general definition of "facilitate." If one is desired, the Committee believes something like the following would be correct:

> Possession of a dangerous weapon facilitates the commission of a crime when the possession is with the intent to use the weapon if the need arises, for example, to protect the defendant, to protect contraband, or to make an escape possible.
>
> Possession does not facilitate a crime if it is accidental, coincidental or entirely unrelated to the crime.

This is based on examples offered in the Peete decision. See 185 Wis.2d 4, 18. Also see Smith v. United States, 110 S. Ct. 2050 (1993), interpreting 18 U.S.C. § 924, a federal statute similar to § 939.63.

In State v. Howard, 211 Wis.2d 269, 564 N.W.2d 753 (1997), the Wisconsin Supreme Court extended the nexus requirement to a case where the gun was in the personal possession of a person arrested for delivery of cocaine. The court held that the jury must still make a factual finding that the defendant possessed the gun to facilitate the crime. The court also held that the Peete requirement applied retroactively.

The Peete requirement was interpreted in State v. Page, 2000 WI App. 267, ¶13,240 Wis.2d 276, 622 N.W.2d 285:

Under the correct reading of Peete, if the evidence is such that a reasonable jury may find beyond a reasonable doubt that the defendant possessed a dangerous weapon in order to use it or threaten to use it should that become necessary, the evidence is sufficient under § 939.63 even if the defendant did not actually use or threaten to use the weapon in the commission of the crime.