

**1335 CARRYING A CONCEALED WEAPON — § 941.23**

USE THIS INSTRUCTION FOR CASES IN WHICH THERE IS NO EVIDENCE OF ANY EXCEPTION TO THE APPLICABILITY OF SEC. 941.23. IF THERE IS EVIDENCE OF AN EXCEPTION, SEE WIS JI-CRIMINAL 1335B.<sup>1</sup>

**Statutory Definition of the Crime**

Carrying a concealed weapon, as defined in § 941.23 of the Criminal Code of Wisconsin, is committed by any person who carries a concealed and dangerous weapon.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant carried<sup>2</sup> a dangerous weapon.

"Carried" means went armed with.

2. The defendant was aware of the presence of the weapon.<sup>3</sup>
3. The weapon was concealed.

**Meaning of "Went Armed"**

The phrase "went armed" means that the weapon must have been either on the defendant's person or that the weapon must have been within the defendant's reach.<sup>4</sup>

### **Meaning of "Dangerous Weapon"**

"Dangerous weapon" means<sup>5</sup>

[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 calculated or likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.]

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

### **Meaning of "Concealed"**

"Concealed" means hidden from ordinary observation. The weapon does not have to be completely hidden.<sup>6</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 1335 was originally published in 1966 and revised in 1989, 1996, 2003, 2006, 2012, and 2016. This revision was approved by the Committee in April 2018; it added to the Comment and footnote 4.

The 2012 revision addressed changes made by 2011 Wisconsin Act 35. The previously published instruction included reference to exceptions to the applicability of § 941.23, which are eliminated here; see Wis JI-Criminal 1335B for an instruction to use when evidence of an exception is in the case.

In State v. Cole, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328, the Wisconsin Supreme Court held that § 941.23 remains constitutional on its face despite the adoption of a state constitutional amendment guaranteeing "the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." Wis. Const. art. I, § 25. However, whether the statute is constitutional as applied must be determined on a case-by-case basis: ". . . only if the public benefit in this exercise of the police power is substantially outweighed by an individual's need to conceal a weapon in the exercise of the right to bear arms will an otherwise valid restriction on that right be unconstitutional as applied." State v. Hamdan, 2003 WI 113, ¶46. For cases involving this "constitutional defense," see Wis JI-Criminal 1335A which provides a separate instruction.

Hamdan also held that prior case law interpreting § 941.23 continues to be viable authority after the adoption of the constitutional amendment, specifically endorsing the interpretations of the "going armed" element. 2003 WI 113, ¶¶21-28. See footnote 2, below.

Hamdan also reaffirmed the decisions in cases considering generally applicable privileges or defenses. 2003 WI 113, ¶37. While a privilege like self-defense may potentially apply to charges under § 941.23, as a practical matter it may be difficult for the facts of a particular case to support them. State v. Dundon, 226 Wis.2d 654, 594 N.W.2d 780 (1999); and, State v. Nollie, 2002 WI 4, 249 Wis.2d 538, 638 N.W.2d 280. Dundon also declined to adopt a special privilege, like the one recognized for possession of a firearm by a felon in State v. Coleman, 206 Wis.2d 199, 556 N.W.2d 701 (1996).

In a decision that preceded the "right to bear arms amendment" the court of appeals had concluded that the creation of an exception for tavern owners in § 941.237, Carrying handgun where alcohol beverages may be sold and consumed, does not preclude the application of § 941.23 to a tavern owner who carries a concealed handgun on the tavern premises. State v. Mata, 199 Wis.2d 315, 544 N.W.2d 528 (Ct. App. 1996). In Hamdan, the court noted that "[i]n light of Article I, Section 25, this analysis in Mata is suspect." Hamdan, supra, at footnote 32.

In 2005, the Committee received an inquiry about the relationship between carrying a concealed weapon in violation of § 941.23 and the rules relating to carrying cased guns. At that time § 167.31(2)(b) provided that "no person may place, possess, or transport a firearm . . . in or on a vehicle unless the firearm is unloaded and encased . . ." This implied that a person may possess a firearm in a vehicle if it is unloaded and encased, but that may conflict with the interpretation of § 941.23 in State v. Walls, 190 Wis.2d 65, 71-72, 526 N.W.2d 765 (Ct. App. 1994), where the court held that:

A person is guilty of carrying a concealed weapon in an automobile where: (1) the weapon is located inside a vehicle and is within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is concealed, or hidden from ordinary view – meaning it

is indiscernible from ordinary observation of a person located outside and within the immediate vicinity of the vehicle.

The Committee concluded that resolving this conflict was beyond the scope of the jury instructions. The Wisconsin Supreme Court addressed this issue in State v. Grandberry, 2018 WI 29, 380 Wis.2d 541, 910 N.W.2d 214, concluding that there is no conflict. During a traffic stop, Grandberry disclosed to police that he had a handgun in the glove compartment of his vehicle. He was charged with and convicted of carrying a concealed weapon. He appealed on the ground that was in compliance with § 167.31. The supreme court affirmed the conviction: "We hold that the Concealed Carry Statute and the Safe Harbor Statute are not in conflict because Grandberry could have complied with both by either obtaining a license to carry a concealed weapon pursuant to Wis. Stat. § 175.60 . . . or by placing his loaded handgun out of reach." 2018 WI 29, ¶3. The court also held that the alleged conflict between the two statute did not make the prohibition on carrying a concealed weapon unconstitutionally vague: ". . . a person of ordinary intelligence has sufficient notice that carrying a concealed and dangerous weapon is unlawful unless one of the exceptions in the Concealed Carry Statute applies." ¶4.

Section 167.31 was amended by 2011 Wisconsin Acts 35 and 51. An exception was created that applies where "the firearm is unloaded or is a handgun." § 167.31(2)(b)1.

1. This instruction is drafted for a case where there is no evidence of an exception to the applicability of § 941.23. The statute has always had an exception for peace officers. 2011 Wisconsin Act 35 created four additional exceptions – see § 941.23(2)(a)-(e):

- a peace officer – sub. (a)
- a qualified out-of-state law enforcement officer – sub. (b)
- a former officer – sub. (c)
- a licensee or out-of-state licensee – sub. (d)
- an individual who carries in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies – sub. (e).

See Wis JI-Criminal 1335B for a model to use where there is evidence that an exception may apply.

2. 2011 Wisconsin Act 35 changed the definition of this offense from "goes armed with" a dangerous weapon to "carries" a dangerous weapon. Section 941.23(1)(ag) provides that "'carry' has the meaning given in s. 175.60(1)(ag)." Section 175.60(1)(ag) defines "carry" as "to go armed with."

3. The original version of Wis JI-Criminal 1335, published in 1966, included the "aware of the presence" requirement. An instruction including that statement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI-Criminal 920. For cases identifying "aware of the presence" as an element of the crime, see State v. Fry and State v. Keith, note 3, below. The 1995 revision of the instruction added "aware of the presence" as a separate element.

4. In Mularkey v. State, 201 Wis. 429, 230 N.W. 76 (1930), the court affirmed the conviction of a driver who had a revolver within his reach on a shelf back of the seat of his automobile but did not have the weapon on his person.

The Mularkey "within his reach" test was reaffirmed by the Wisconsin Supreme Court in State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565 (1986). In Fry, the court found sufficient evidence to support a conviction for carrying a concealed weapon where the gun was in the glove compartment of the vehicle the defendant was driving.

In State v. Walls, 190 Wis.2d 65, 526 N.W.2d 765 (Ct. App. 1994), the court affirmed a conviction for carrying a concealed weapon where a handgun was lying on the front seat of an automobile. The court held that:

. . . the statute evinces a strong rationale to prevent the carrying of weapons in automobiles, as well as on a person. . . . A person is guilty of carrying a concealed weapon in an automobile where: (1) the weapon is located inside a vehicle and is within the defendant's reach; (2) the defendant is aware of the presence of the weapon; and (3) the weapon is concealed, or hidden from ordinary view – meaning it is indiscernible from ordinary observation of a person located outside and within the immediate vicinity of the vehicle.

190 Wis.2d 65, 71-72.

In State v. Keith, 175 Wis.2d 75, 498 N.W.2d 865 (Ct. App. 1993), the court affirmed a conviction where the defendant had a gun in her purse on the porch of her home. The court rejected Keith's argument that to "go armed, you have to go somewhere." The court held that "there is no separate element requiring that a person actually go somewhere." 175 Wis.2d 75, 79.

In State v. Hamdan, the court rejected the argument that Keith was wrongly decided, stating that "[we] continue to adhere to prior interpretations of the 'goes armed' language." 2003 WI 113, ¶24.

The definition of "went armed" was discussed in State v. Grandberry, 2018 WI 29, 380 Wis.2d 541, 910 N.W.2d 214, but no change was adopted.

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

2015 Wisconsin Act 109 [effective date: February 8, 2016] created § 941.23(1)(ap): "Notwithstanding s. 939.22(10), 'dangerous weapon' does not include a knife."

6. The "hidden from ordinary observation" requirement is adapted from State v. Mularkey, 201 Wis. 429, 230 N.W.2d 76 (1930). Also see, State v. Asfoor, 75 Wis.2d 411, 433, 249 N.W.2d 529 (1976), which approved an instruction that included this requirement.