

**1335A CARRYING A CONCEALED WEAPON: UNLAWFUL PURPOSE —
§ 941.23**

USE THIS INSTRUCTION FOR CASES IN WHICH THE COURT HAS DETERMINED THAT THE DEFENSE BASED ON THE STATE CONSTITUTIONAL RIGHT TO BEAR ARMS APPLIES.¹

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 for an unlawful purpose.

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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant carried² a dangerous weapon.
"Carried" means went armed with.
2. The defendant was aware of the presence of the weapon.³
3. The weapon was concealed.
4. The defendant went armed with the weapon for an unlawful purpose.

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.⁴

Meaning of "Dangerous Weapon"

"Dangerous weapon" means⁵

[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.⁶

Meaning of "Unlawful Purpose"

"Unlawful purpose" means intent to use the weapon in furtherance of the commission of (name intended crime).⁷

The crime of (name intended crime) is committed by one who

[DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE]⁸

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four 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 1335A was originally published in 2004 and revised in 2006 and 2012. This revision was approved by the Committee in February 2016; it updated footnote 5 to reflect changes made by 2015 Wisconsin Act 109.

This instruction was drafted to address the "constitutional defense" recognized by the Wisconsin Supreme Court in State v. Hamdan, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785.

In a case decided the same day as Hamdan, the court held that § 941.23 is 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. State v. Cole, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328. 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.

Because the defense is based on the amendment to the state constitution, it applies only to offenses committed after the amendment's effective date, which was November 30, 1998. State v. Cole, *supra*, ¶9; State v. Gonzales, 2002 WI 59, 253 Wis.2d 134, 645 N.W.2d 264.

The Wisconsin Supreme Court applied Cole and Hamdan in State v. Fisher, 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495. In Fisher, the trial court dismissed a charge of carrying a concealed weapon against a tavern owner who kept a loaded gun in the center console of his vehicle. Fisher was arrested at about 4 p.m. while running personal errands. The supreme court reversed, concluding "that § 941.23 is constitutional as applied to Fisher because his interest in exercising his right to keep and bear arms for purposes of security by carrying a concealed weapon in his vehicle does not substantially outweigh the state's interest in enforcing § 941.23." Fisher, ¶3.

Procedure for determining whether the defense is raised.

Hamdan held that a defendant seeking to raise a "constitutional defense" to a charge under § 941.23 must raise the issue by pretrial motion and show two things:

1) that under the circumstances, the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweighed the State's interest in enforcing the concealed weapons statute; and,

2) that the defendant concealed his or her weapon because concealment was the only reasonable means under the circumstances to exercise his or her right to bear arms.

Hamdan did not provide a complete delineation of the scope of these requirements, but did hold that:

. . . the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business. Conversely, the State's interest in prohibiting concealed weapons is least compelling in these circumstances. . . .

If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence or privately operated business, and to safely move and store weapons within these premises.

Hamdan, *supra*, ¶¶67 and 68.

If the trial court finds that the defendant has satisfied both requirements, the state must, still at the pretrial stage, assert and show probable cause to believe that the defendant had an unlawful purpose at the time he or she carried the concealed weapon. If supported by evidence at trial, the issue of unlawful purpose is to be submitted to the jury. Hamdan, ¶¶86-88.

Submitting the defense to the jury.

For cases involving the constitutional defense recognized by Hamdan, Wis JI-Criminal 1335A provides a separate instruction with an additional element: the state must disprove the constitutional defense by proving that the defendant went armed with a concealed weapon for an unlawful purpose. The Committee concluded that this was the most effective way to address the question, even though the Hamdan decision suggested a different procedure:

¶87. . . . Whether the defendant had an unlawful purpose, defined as an intent to use the weapon in furtherance of the commission of a crime, is a question of fact. The question should be submitted to the trier of fact along with separate, traditional instructions on the crime of carrying a concealed weapon.

¶88. If a jury answers that the defendant did not intend the unlawful purpose specifically alleged by the State, then it will not need to reach the questions posed in the jury instructions for a CCW offense as the defendant's conduct remains constitutionally protected. If any unlawful purpose is proven, then the defendant can be found guilty of carrying a concealed weapon upon proof beyond a reasonable doubt of the elements of carrying a concealed weapon. See Wis JI-Criminal 1335.

These paragraphs could be read to authorize submitting this issue as a separate verdict question. The Committee concluded that presenting the unlawful purpose issue first as a separate question could create a problem in that it would assume that the defendant "went armed" with a concealed weapon, facts that must be established as elements of the crime. The Committee concluded that it is preferable to have a separate

instruction for a case in which the defense is raised, which includes the absence of the defense as an additional element of the crime. This is consistent with the way other defenses are usually addressed.

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 § 175.60(1)(ag). Section 175.60(1)(ag) defines "carry" as "to go armed with."

3. See note 3, Wis JI-Criminal 1335.

4. See note 4, Wis JI-Criminal 1335.

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. See note 6, Wis JI-Criminal 1335.

7. The definition of "unlawful purpose" used in the instruction is the one required by the Hamdan decision:

... Whether the defendant had an unlawful purpose, defined as an intent to use the weapon in furtherance of the commission of a crime, is a question of fact. The question should be submitted to the trier of fact along with separate, traditional instructions on the crime of carrying a concealed weapon. State v. Hamdan, 2003 WI 113, ¶87.

8. The Committee concluded that the elements of the alleged intended crime should be included in the instruction, as they are for attempts. See Wis JI-Criminal 580. Also see, Wis JI-Criminal 1795, Bail Jumping, which has been modified to reflect the decision in State v. Henning, 2003 WI App 54, 261 Wis.2d 664, 660 N.W. 698, holding that where a bail jumping charge is based on committing a new crime, the jury must be instructed on the elements of that crime.