

**1335B CARRYING A CONCEALED WEAPON: EVIDENCE OF EXCEPTION
— § 941.23**

USE THIS INSTRUCTION FOR CASES IN WHICH THERE IS EVIDENCE OF THE LICENSEE EXCEPTION TO THE APPLICABILITY OF SEC. 941.23. USE IT AS A MODEL IF THERE IS EVIDENCE OF ONE OF THE OTHER EXCEPTIONS.¹

Statutory Definition of the Crime

Carrying a concealed weapon, as defined in § 941.23 of the Criminal Code of Wisconsin, is committed by a person who is not (a licensee) (an out-of-state licensee)² 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 four³ elements were present.

Elements of the Crime That the State Must Prove

1. The defendant carried⁴ a dangerous weapon.

"Carried" means went armed with.

2. The defendant was aware of the presence of the weapon.⁵
3. The weapon was concealed.
4. The defendant was not (a licensee) (an out-of-state licensee).⁶

("Licensee" means an individual holding a valid license to carry a concealed weapon issued under section 175.60 of the Wisconsin Statutes.)⁷

("Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license to carry a concealed weapon.)⁸

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.⁹

Meaning of "Dangerous Weapon"

"Dangerous weapon" means¹⁰

[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.¹¹

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

This instruction was originally published as Wis JI-Criminal 1335 in 1966 and revised in 1988, 1996, 2003, and 2006. In 2011, Wis JI-Criminal 1335 was revised to eliminate reference to exceptions to the applicability of § 941.23 and Wis JI-Criminal 1335B was created for use when evidence of an exception is in the case. It reflects changes made to § 941.23 by 2011 Wisconsin Act 35.

See the Comment to Wis JI-Criminal 1335 for discussion of case law upholding the constitutionality of § 941.23 after 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.

Also see the Comment to Wis JI-Criminal 1335 for a discussion of the relationship between carrying a concealed weapon in violation of § 941.23 and the rules relating to carrying cased guns in § 167.31(2).

1. This instruction can be used as a model for cases where one of the other exceptions to § 941.23 applies. The first paragraph of the instruction would be modified to replace "not a licensee" with an equivalent statement that the person is not covered by the exception raised in the case. And the fourth element would be changed to include the same statement.

This instruction is drafted for the case where there is evidence of the licensee exception to the applicability of § 941.23. The statute has always had an exception for peace officers. 2011 Wisconsin Act created four additional exceptions – see § 941.23(2)(a)-(e):

- a peace officer – sub. (a)
- a qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g) – sub. (b)
- a former officer, as defined in s. 941.23(1)(c) – sub. (c)
- a licensee, as defined in s. 175.60(1)(d) or out-of-state licensee, as defined in s. 175.60(1)(g) – 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).

In *State v. Williamson*, 58 Wis.2d 514, 206 N.W.2d 613 (1973), the Wisconsin Supreme Court confirmed that the question whether a defendant is a peace officer is one that must be raised by the defendant as an affirmative defense. The court noted that a long list of officials qualify as "peace officers," making it difficult for the state to establish that the defendant was not one of the identified individuals. The court recognized that an exception to the general rule imposing the burden on the state to disprove defenses exists where "evidence

of the exempting fact lies especially within the control of the defendant or peculiarly within his knowledge." 58 Wis.2d at 524.

Several years after Williamson was decided, Wisconsin law relating to defenses was clarified in Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). Moes was concerned with the statutorily recognized defense of coercion – see § 939.46. The statute defines the defense but does not address the procedure for litigating a coercion claim. Moes concluded that the common law rule in Wisconsin for "affirmative defenses" is that a burden of production can be placed on defendant; if the burden of production is satisfied, the state has the burden to prove the defense does not apply [by the beyond a reasonable doubt standard]. While the United States Constitution allows imposing a burden of persuasion on the defendant for true affirmative defenses [those that do not negate an element of the crime], the common law rule applies as a matter of state law unless the legislature has specifically provided to the contrary. 91 Wis.2d 756, 768. As to the rule under federal due process analysis, see Patterson v. New York, 432 U.S. 197 (1977).

In the Committee's judgment, statutory exceptions are therefore best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the text of the instruction at note 6.

2. See footnote 1, supra.

3. The instruction treats the absence of the exception as an element that the state must prove. See note 1, supra. The absence of the exception becomes an element only when raised by the evidence. If there is no evidence of an exception, only three elements must be proved. Wis JI-Criminal 1335 is the instruction to use in that case.

4. 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."

5. 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 9, below. The 1995 revision of the instruction added "aware of the presence" as a separate element.

6. This element must be changed if one of the other exceptions to the applicability of § 941.23 is raised in the case. The exceptions are listed in footnote 1, supra.

7. This is the definition of "licensee" provided in § 175.60(1)(d).

8. This is the definition of "out-of-state licensee" provided in § 175.60(1)(g), with the addition of the last phrase: "to carry a concealed weapon." "Out-of-state-license" is defined in § 175.60(1)(f).

9. 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 B 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.

10. 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.

11. 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.