1338 CARRYING A HANDGUN ON PREMISES WHERE ALCOHOL BEVERAGES ARE CONSUMED — § 941.237

Statutory Definition of the Crime

Section 941.237 of the Criminal Code of Wisconsin is violated by one who intentionally goes armed with a handgun on any premises licensed for the sale and consumption of alcohol beverages.[1]

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 went armed with a handgun.

   The phrase "went armed" means that a firearm must have been on the defendant's person or that a firearm must have been within the defendant's reach.[2] In addition, the defendant must have been aware of the presence of the firearm.[3]

   ["Handgun" means any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of an explosive to expel a projectile through a smooth or rifled bore.][4]

2. The defendant went armed with a handgun on a premises licensed for the sale and consumption of alcohol beverages.[5]

3. The defendant acted intentionally.

This requires that the defendant knew that (he) (she) was armed with a handgun and knew that the premises was licensed for the sale and consumption of alcohol beverages.[6]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

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 1338 was originally published in 1996 and revised in 2007, 2011, and 2019. The 2019 revision amended the definition of "went armed" defined under element 1 and updated notes 2 and 3 in the Comment. This revision was approved by the Committee in October 2023. It addressed the repeal of subsection 941.237(4) and the introduction of Wis JI-Criminal 1338A, which concerns the exceptions set forth in § 941.237(3)(a) – (j).

This instruction is for a violation of § 941.237, created by 1993 Wisconsin Act 95, effective date: December 25, 1993. The offense is defined in sub. (2): "Whoever intentionally goes armed with a handgun on any premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125 is guilty of a Class A misdemeanor." As to Class "B" and "Class B" licenses, see note 1 below.

Numerous exceptions are provided in § 941.237(3)(a) through (j). 2011 Wisconsin Act 35 amended

§ 941.237(3) by creating subds. (cr)-(cx), which recognize three additional exceptions:

- a qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g) – sub. (3)(cr)
- a former officer, as defined in s. 941.23(1)(c) – sub. (3)(ct)
- a licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g) if the licensee is not consuming alcohol on the premises – sub. (3)(cx).

See Wis JI-Criminal 1338A for a corresponding instruction concerning the exceptions set forth in § 941.237(3)(a) – (j).

2011 Wisconsin Act 35 repealed subsection (4) of section 941.237. This subsection stated that "[T]he state does not have to negate any exception under sub. (3). Any party that claims that an exception under sub. (3) is applicable has the burden of proving the exception by a preponderance of the evidence."

Prior to the enactment of 2011 Wisconsin Act 35, it appears that the burden of disproving an exception under sub. (3) never shifted to the State, regardless of whether the defendant successfully demonstrated the exception by a preponderance of the evidence. However, the repeal of sub. (4) without any replacement language brought about two significant changes.

First, the removal of sub. (4) relieved the defendant from the burden of proving the exception by a preponderance of the evidence. The Committee believes it is now sufficient for the defendant to simply point to or produce "some evidence" in support of an exception under sub. (3) in order to fulfill their required burden.

Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution; facts elicited from prosecution witnesses by defense cross-examination or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996).

Secondly, in the event that the defendant meets the "some evidence" standard, the Committee believes that the burden shifts to the State to disprove the exception beyond a reasonable doubt. See Wis JI-Criminal 1338A.

1. This phrase is used in place of the following statutory language: ". . . premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125." The Class "B" license is described in § 125.26(1); it "authorizes retail sales of fermented malt beverages to be consumed either on the premises where sold or off the premises." The Class "B" permit is described in § 125.27(1); it applies to country clubs and similar clubs not open to the general public and "authorizes retail sales of fermented malt beverages to be consumed on the premises where sold." The "Class B" license is described in § 125.51(3); it "authorizes the retail sale of intoxicating liquor for consumption on the premises where sold by the glass and not in the original package or container."

In addition to avoiding the inherent difficulty in communicating to a jury the difference between a "Class B" license and a Class "B" license, the phrase used in the instruction is believed to address the core conduct the statute was intended to address: carrying a handgun into a tavern. Though not used in subsection

(2), which defines the offense, "tavern" does appear in some of the exceptions listed in subsection (3). And it is defined as follows in subsection (1)(fm): "'Tavern' means an establishment, other than a private club or fraternal organization, in which alcohol beverages are sold for consumption on the premises."

2. This is the definition of "went armed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. See note 2 of that instruction for cases discussing "went armed."

3. The "aware of the presence" requirement 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 note 3 of Wis JI-Criminal 1335. The 1995 revision of that instruction added "aware of the presence" as a separate element.

4. This is the definition of "handgun" provided in § 175.35(1)(b). That definition is adopted by cross-reference in § 941.237(1)(d).

5. See note 1, supra.

6. The Committee concluded that in this statute, the significance of the use of the word "intentionally" is to require knowledge that one is armed and knowledge that the premises is a licensed one. See § 939.23(3).