

1341A POSSESSION OF A MACHINE GUN OR OTHER FULL AUTOMATIC FIREARM — § 941.26(1)(a)**Statutory Definition of the Crime**

Section 941.26(1)(a) of the Criminal Code of Wisconsin is violated by a person who possesses a machine gun or other full automatic firearm.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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

"Possessed" means that the defendant knowingly² had actual physical control of a firearm.³

2. The firearm was a [machine gun] [full automatic firearm].

A [machine gun] [full automatic firearm] is any weapon that shoots automatically more than one shot, without manual reloading, by a single function of the trigger.⁴

Jury's Decision

If you are satisfied beyond a reasonable doubt that both 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 1340A in 1996. It was renumbered Wis JI-Criminal 1341A in 2007. The 2007 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in December 2009. It restored material in footnote 2 that was inadvertently dropped in 2007.

This instruction is for a violation of § 941.26(1)(a). Possession of "any machine gun or other full automatic firearm" is prohibited. "Machine gun" is defined in § 941.27(1) in a way that includes any full automatic firearm. Thus, the instruction can be used with reference to either "machine gun" or "full automatic firearm" depending on the way the offense is charged. Both terms are defined in the same way.

Note that there are several exceptions set forth in subsection (3) of § 941.26 and in subsection (2) of § 941.27. For example, "possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament or keepsake" is not prohibited. See, § 941.27(2). It is the Committee's judgment that statutory exceptions are best handled 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 is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 941.26(1)(a) provides that "no person may sell, possess, use or transport any machine gun or other full automatic firearm." The instruction is drafted for a case involving "possession" because that appeared to the Committee to be the most likely charge and because "possess" is the most inclusive term.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

The Committee concluded that what is required for this offense is knowing possession of a firearm that is a machine gun or full automatic weapon, not knowledge that the firearm has characteristics that make it a machine gun or full automatic weapon. This is because § 941.26(1)(a) does not include any "intent words" that indicate knowledge of the nature of the weapon is required. See § 939.23(1). Note, however, that in interpreting federal statutes defining a similar offense, the United States Supreme Court concluded that knowledge of the nature of the weapon was required. In United States v. Staples, 511 U.S. 600 (1994), the court held that in a prosecution for violation 26 USC § 5861(d), the government "should have been required to prove beyond a reasonable doubt that [Staples] knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machine gun." The decision involved statutory construction; the court found that the language of the statute was not helpful because it is silent on "mens rea" and concluded:

. . . absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.

The Committee concluded that Staples is not binding on the construction of the Wisconsin statute, since federal statutes do not incorporate a rule regarding "intent words" like the one provided in § 939.23(1). Though not always consistent on this issue, Wisconsin appellate courts typically find that absence of an "intent word" in a statute in the criminal code indicates legislative intent that no knowledge element is required. See, for example, State v. Stanfield, 105 Wis.2d 553, 560, 314 N.W.2d 339 (1982), interpreting what is now

§ 951.02, cruelty to animals; State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986), interpreting § 946.13, private interest in public contract; and, State v. Neumann, 179 Wis.2d 687, 708, 508 N.W.2d 54 (Ct. App. 1993), interpreting § 940.225(2)(a). However, a mental element has been read into criminal statutes outside the criminal code. See, State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977), adopting a mental element for operating after revocation, and State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973), adopting a knowledge element for controlled substance offenses.

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. This is based on the definition provided in § 941.27(1)(a). Subsections (b) and (c) of the same statute extend the definition to include the frame or receiver or other part designed for use in converting a weapon to an automatic one [sub. (b)] and to a combination of parts from which an automatic weapon could be assembled [sub. (c)]. The instruction obviously must be modified if one of those options is involved.