

1341B USING OLEORESIN OF CAPSICUM (PEPPER SPRAY)¹ OR CS GEL TO CAUSE BODILY HARM OR DISCOMFORT — § 941.26(4)(b)**Statutory Definition of the Crime**

Section 941.26(4)(b) of the Criminal Code of Wisconsin is violated by one² who intentionally uses a device or container of (oleoresin of capsicum)³ (CS gel) to cause bodily harm or bodily discomfort to another person.

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 used a device or container of (oleoresin of capsicum) (CS gel)⁴ to cause bodily harm or bodily discomfort to (name of victim).

“Cause” means that the defendant’s conduct was a substantial factor in producing bodily harm or discomfort.⁵

[“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.]⁶

2. The defendant acted intentionally.

This requires that the defendant acted with the mental purpose to cause bodily harm or bodily discomfort to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.⁷

It also requires that the defendant knew that the device or container contained (oleoresin of capsicum) (CS gel).⁸

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and 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 intent and knowledge.

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 1341 in 1994. It was revised and renumbered as Wis JI-Criminal 1341B in 2007 and revised again in 2014 to reflect changes made by 2013 Wisconsin Act 77. This revision was approved by the Committee in December 2019; it reflects changes made by 2019 Wisconsin Act 52.

This instruction is for one of several offenses contained in § 941.26(4) as amended by 1993 Wisconsin Act 91. Act 91 was enacted in December 1993 but with a delayed effective date of October 1, 1994. The criminal offenses involving “pepper spray” therefore apply only to conduct occurring on or after October 1, 1994.

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

See Wis JI-Criminal 1341C for violations of § 941.26(4)(d), using “pepper spray” to cause bodily harm or discomfort to a police officer.

See Wis JI-Criminal 1341D for violations of § 941.26(4)(L), possession of “pepper spray” by a convicted felon.

1993 Wisconsin Act 91 also required the Department of Justice to enact administrative rules relating to the sale and distribution of oleoresin of capsicum products. Those rules are found in Chapter Jus 14, Wisconsin Administrative Code. 2013 Wisconsin Act 77 [effective date: December 13, 2013] created § 941.26(4m) to read: “The department of justice may not promulgate or enforce any rule that regulates a device or container described under para. (a).”

1. The statute uses the term “oleoresin of capsicum” to refer to the substance commonly known as “pepper gas,” “pepper spray,” or “pepper mace.” Not all material commonly referred to by these terms may meet the requirements of § 941.26(4)(a), which provides, in effect, that the offenses defined in sub. (4) apply to “a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort.” § 941.26(4)(a). Thus, the instruction uses the statutory term “oleoresin of capsicum” throughout.

2. Subsection (4)(c) of § 941.26 provides that the criminal offense defined in subsec. (4)(b) does “not apply to any of the following:”

1. “Any person acting in self-defense or defense of another, as allowed under s. 939.48.”
2. “Any peace officer acting in his or her official capacity.”
3. “Any armed forces or national guard personnel acting in the line of duty.”

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

Factual disputes about the applicability of an exception would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that they are best handled in the same manner as most “affirmative defenses.” That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or 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).

3. See note 1, supra.

4. “‘CS gel’ means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a).”

5. The Committee concluded that the “substantial factor” definition of “cause” is sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This is the definition of “bodily harm” provided in § 939.22(4).

7. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

8. The knowledge requirement is included because the statute uses the word “intentionally.” Section 939.23(3) provides that this requires “purpose to do the thing or cause the result specified . . .” and “knowledge of those facts which are necessary to make his or her conduct criminal which are set forth after the word ‘intentionally.’” The Committee concluded that the container or device being one that contains oleoresin of capsicum or CS gel is one of those facts. The Committee also concluded that is sufficient that the defendant know the substance by a common name, like “pepper spray,” and not that the defendant know the exact chemical composition of the substance.