

1341D POSSESSION OF OLEORESIN OF CAPSICUM (PEPPER SPRAY)¹ OR CS GEL BY A CONVICTED FELON — § 941.26(4)(L)**Statutory Definition of the Crime**

Section 941.26(4)(L) of the Criminal Code of Wisconsin is violated by a person who possesses a device or container of (oleoresin of capsicum)² (CS gel)³ and has been convicted of a felony.

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 possessed a device or container.

“Possess” means that the defendant knowingly⁴ had actual physical control of a device or container.⁵

Deciding About Knowledge⁶

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.

2. The device or container contained (oleoresin of capsicum) (CS gel).⁷
3. The defendant had been convicted of a felony before (date of offense).⁸

(Name of felony) is a felony in Wisconsin.⁹

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

This instruction was originally published as Wis JI-Criminal 1341B in 1995. It was revised and renumbered as Wis JI-Criminal 1341D in 2007. The instruction was revised in 2019. The 2019 revision reflected changes made by 2019 Wisconsin Act 52. This revision was approved by the Committee in August 2023; it incorporated a paragraph about “Deciding About Knowledge” and added to the comment.

This instruction is for an offense created by 1995 Wisconsin Act 25 [effective date: July 20, 1995]. Section 2 of 1995 Wisconsin Act 25 provides that it “first applies to the possession of a device or container on the effective date of this subsection, regardless of the date that the prior felony or crime, as described in section 941.26(4)(L) of the statutes, as created by this act, occurred.” The statute does not apply if the person has received a pardon. § 941.26(4)(L).

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

Other offenses involving oleoresin of capsicum or CS gel are addressed in Wis JI-Criminal 1341B and 1341C.

1. The statute uses the term “oleoresin of capsicum” to refer to the substance commonly known as “pepper spray” or “pepper mace.” It may help the understandability of the instruction if the common name is used, but the statutory term is used throughout this model. The full statutory description is “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).

2. See note 1, supra.

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

4. 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).

5. 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.

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 4, *supra*. The Committee concluded that sec. 941.26(4)(L) does not require proof that defendants know of the prohibition against possessing the designated substances. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, “When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term ‘intentionally,’ the phrase ‘with intent to,’ the phrase ‘with intent that,’ or some form of the verbs ‘know’ or ‘believe.’” Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. Because the offense definition does not use the word “intentionally,” the Committee concluded that knowledge that the device or container contained oleoresin of capsicum or CS gel is not required. Compare footnote 8 in Wis JI-Criminal 1341B.

8. The date of the offense should be inserted in this blank.

9. See note 7, Wis JI-Criminal 1343, which discusses the application of a similar statute to felony convictions from other states, stipulating to the fact of the felony conviction, and similar issues.