

**1342 POSSESSION OF A SHORT-BARRELED SHOTGUN OR RIFLE<sup>1</sup> —  
§ 941.28**

**Statutory Definition of the Crime**

Section 941.28 of the Criminal Code of Wisconsin is violated by one who possesses a short-barreled (rifle) (shotgun).

**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 (rifle)<sup>2</sup> (shotgun).<sup>3</sup>

"Possess" means that the defendant knowingly<sup>4</sup> had actual physical control<sup>5</sup> of a (rifle) (shotgun).

2. The (rifle) (shotgun) was short-barreled.<sup>6</sup>

["Short-barreled rifle" means a rifle having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches.]<sup>7</sup>

["Short-barreled shotgun" means a shotgun having one or more barrels having a length of less than 18 inches measured from closed breech or bolt face to muzzle or a shotgun having an overall length of less than 26 inches.]<sup>8</sup>

### 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

Wis JI-Criminal 1342 was originally published in 1983 and revised in 1985, 1987, and 1995. This revision was approved by the Committee in February 2007 and involved adoption of a new format and nonsubstantive changes to the text.

In State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), the court held that § 941.28 applies to a shotgun whose firing pin has been removed. The court noted its agreement with the trial court's conclusion that the statute does not require "that the shotgun be capable of being fired at the time it was possessed." 171 Wis.2d 175, 178.

1. This instruction is for a violation of § 941.28, created by Chapter 115, Laws of 1979 (effective date May 1, 1979). The statute prohibits not only "possession" but also "selling," "offering to sell," "transporting," "purchasing," or "going armed with" a short-barreled rifle or shotgun. The instruction is written in terms of "possession" because the Committee concluded that "possession" would be the most commonly charged type of offense. Further, "possession" is a broad enough term to cover most of the other prohibited activities; one must possess something in order to transport it, or to sell it, or to go armed with it.

2. "Rifle" is defined by § 941.28(1)(a):

"Rifle" means a firearm designed or redesigned, made or remade, and intended to be fired from the shoulder or the hip and designed or redesigned and made or remade to use the energy of a propellant in a metallic cartridge to fire through a rifled barrel a single projectile for each pull of the trigger.

3. "Shotgun" is defined by § 941.28(1)(d):

"Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder or the hip and designed or redesigned and made or remade to use the energy of a propellant in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

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 statutory definitions of "rifle" and "shotgun" require that it be "designed or redesigned, made or remade, and intended to be fired from the shoulder or hip. . . ." The weapon which is the subject of a charge covered by this instruction must have originally been "intended to be fired from the shoulder or hip" and later modified to be "short-barreled." The weapon so modified need not be "intended to be shot from the shoulder or hip."

The court of appeals reached a conclusion consistent with this analysis in State v. Johnson, *supra* at 182.

. . . the pertinent intent is that of the fabricator and not that of the possessor. . . Thus, a weapon is within the scope of section 941.28(1)(d) if it was either "designed" or "redesigned" and either "made" or "remade" "to be fired from the shoulder or hip" and intended by the designer or redesigner and the maker or remaker to be so operated.

The Johnson court rejected the argument that "the statute's prohibition could be defeated by the possessor's professed subjective intent to not fire the weapon from his or her shoulder or hip." 171 Wis.2d 175, 183.

Because the offense definition does not use the word "intentionally," the Committee concluded that knowledge that the rifle or shotgun was short-barreled is not required.

7. This is the definition provided in § 941.28(1)(b).

8. This is the definition provided in § 941.28(1)(c).