

1344 POSSESSION OF A FIREARM BY A PERSON SUBJECT TO AN INJUNCTION — § 941.29(1m)(f) or (g)**Statutory Definition of the Crime**

Section 941.29 of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person is subject to [an injunction issued under (§ 813.12) (§ 813.122)] [a tribal injunction] [an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m))].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.

A firearm is a weapon which acts by the force of gunpowder.²

[It is not necessary that the firearm was loaded or capable of being fired.]³

“Possess” means that the defendant knowingly⁴ had actual physical control of a firearm.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.⁵

[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.]

2. The defendant was subject to [an injunction issued under [(§ 813.12) (§ 813.122)] [(a tribal injunction)] [an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m))] before (date of offense)].

An injunction is a court order prohibiting specified conduct.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 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 1344 was originally published in 1996 and revised in 2008 and 2015. This revision was approved by the Committee in December 2018; it made changes in the Comment and non-substantive changes in the text.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised in 2016 to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a “violent felony” or a “violent misdemeanor.” Those terms are defined in sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: “This subsection does not apply to sentences imposed after July 1, 2020.”]

This instruction is for a violation of § 941.29(1m)(f) or (g) – by a person subject to an injunction. It is modeled after Wis JI-Criminal 1343, Possession of a Firearm, defined by § 941.29(1m)(a).

Section 941.29(4)(f) applies to persons enjoined under § 813.12 (domestic abuse) and § 813.122 (child abuse), and to an injunction or order “issued by a tribal court under a tribal domestic abuse ordinance adopted in conformity with this section.” § 813.12(1)(e). The tribal injunction must include notice that the respondent is subject to the requirements and penalties of § 941.29. Section 941.29(4)(g) applies to persons ordered not to possess a firearm under § 813.123(5m) (vulnerable adult injunctions) or § 813.125(4m) (harassment injunctions). Those statutes require specific findings to support the firearm prohibition.

There is authority recognizing that defendants may offer to stipulate to the fact of a prior felony conviction when the charge is possession of a firearm by a felon under § 941.29(1m)(a). The same concerns may lead to offers to stipulate to the fact of an injunction having been issued under the subsection addressed by this instruction. See Wis JI-Criminal 1343, footnote 8, regarding stipulations in possession by a felon cases. Also see Wis JI-Criminal 162A Law Note: Stipulations.

Note that there are several exceptions set forth in subsections (5) through (10) of § 941.29. See note 1, Wis JI-Criminal 1343, Possession Of A Firearm.

1. Here select the number of the statute under which the injunction or order was issued. All injunctions issued under §§ 813.12 and 812.122 include a prohibition against possession of a firearm. A tribal injunction that satisfies § 813.12(1)(e) is covered if it “includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128(3g).” § 941.29(1m)(f). Injunctions under §§ 813.123 and § 813.125 may include an order prohibiting firearm possession if a specific finding is made by the court. See § 813.123(5m) and § 813.125(4m).

2. The term “firearm” is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns. See note 3, Wis JI-Criminal 1305.

3. Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953).

Possession of a disassembled and inoperable firearm is a violation of § 941.29. The “term ‘firearm’ is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly.” State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491

N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of “shotgun” under § 941.28.

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 the one provided in Wis JI-Criminal 920. 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. This is the definition of “injunction” used in Wis JI-Criminal 2040.