

1344 POSSESSION OF A FIREARM [BY A PERSON SUBJECT TO AN INJUNCTION]¹ — § 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))).²

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.³

[It is not necessary that the firearm was loaded or capable of being fired.]⁴

“Possess” means that the defendant knowingly⁵ had actual physical control of a firearm.

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.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.⁷

[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 or her 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)).⁸

An injunction is a court order prohibiting specified conduct.⁹

[The parties have agreed that an injunction was issued to the defendant under subsection ((§ 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) and you must accept this as conclusively proved.]¹⁰

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, 2015, and 2018. The 2018 revision made changes in the comment and non-substantive changes in the text. This revision was approved by the Committee in August 2023; it incorporated a paragraph about “Deciding About Knowledge” and added to the comment.

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).

See Wis JI-Criminal 1343D for violations of § 941.29(1m)(bm) through (em), possession of a firearm by a person who has been adjudicated delinquent for an act that would be a felony if committed by an adult in the state, found not guilty of a felony due to mental disease or defect, found not guilty or not responsible for a felony in another jurisdiction due to insanity or mental disease, defect, or illness, committed for treatment under s. 51.20 (13) (a) and ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 2007 stats., or who has been ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 51.45 (13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (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.

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. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses “Possession of a firearm.” However, this instruction only applies to individuals who are prohibited from possessing firearms because they were subject to an injunction on the date of the offense. The bracketed language “by a person subject to an injunction” is optional and can be included to distinguish between those individuals restricted from firearm possession under § 941.29(1m)(f) or (g) and other types of individuals who are also banned from possessing firearms, such as those who have been adjudicated delinquent, found not guilty of a felony by reason of mental illness or defect, or are adult felons.

2. 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(1e) 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).

3. 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.

4. 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.

5. 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).

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 5, supra. The Committee concluded that subsections (1m)(f) and (g) do not require proof that defendants know they were subject to an injunction or order or know of the prohibition against possessing a firearm. 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. 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.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that “handling” a firearm was sufficient to satisfy the “possession” element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

8. Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who “knowingly” violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.Ct. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

Section 941.29(1m)(f) provides the following:

The person is subject to an injunction issued under s. 813.12 or 813.122 or under a tribal injunction, as defined in s. 813.12 (1) (e), issued by a court established by any federally recognized Wisconsin Indian tribe or band, except the Menominee Indian tribe of Wisconsin, that 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). [Emphasis added.]

Based on the language of this subsection, the Committee believes that the notice provision is exclusively applicable to tribal injunctions. Circuit court orders under sections 813.12 and 813.122 have explicit notice requirements concerning section 941.29. Conversely, tribal injunctions may not have the same requirement. Given that a tribal injunction must fulfill certain criteria, such as originating from a federally recognized Wisconsin tribe (excluding Menominee), containing notice regarding the requirements and penalties outlined in section 941.29, and being filed in the circuit court, it is logical to ensure that a respondent receives actual notice regarding the requirements and penalties specified in § 941.29(1m)(f) for a tribal injunction. This interpretation aligns with the original enactment of this provision in 1995 and subsequent amendments over the years. It has consistently been the case that the later provisions, including the notice requirement, have always been applicable to tribal injunctions.

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

10. Defendants may offer to stipulate to the fact of an injunction having been issued under § 813.12 or § 813.122 or under a tribal injunction, as defined in § 813.12 (1) (e). The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, AGREED FACTS.

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 effect of a stipulation in a prosecution for violating § 941.29(1m)(a) has been described as follows:

. . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister’s crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

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. Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of possession of a firearm by a person subject to an injunction is that an injunction was issued to you under subsection ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before the date of this offense?
2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that an injunction issued to you before the date of this offense?
3. Do you understand that the State has to convince each member of the jury that an injunction was issued to you before the date of this offense?
4. Do you understand that with this stipulation, you are agreeing that I tell the jury that an injunction under ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) was issued to you before the date of this offense, and that they are to accept this fact as conclusively proved?
5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?
6. Have you had enough time to talk all of this over with your attorney?
7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?
8. Are you entering into this agreement of your own free will?
9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands (his) (her) right to enter into this agreement regarding an injunction being issued to (him) (her) before the date of this offense or to not enter into this agreement?
2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not

formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.