

1344A POSSESSION OF AN ELECTRIC WEAPON — § 941.295**Statutory Definition of the Crime**

Section 941.295 of the Criminal Code of Wisconsin is violated by a person who possesses an electric weapon.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 device.

"Possessed" means that the defendant knowingly² had actual physical control of a device.³

2. The device was an electric weapon.

An electric weapon is any device which is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.⁴

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 in 2010. This revision was approved by the Committee in October 2011; it updated the Comment to reflect changes made by 2011 Wisconsin Act 35.

Note that there are several exceptions set forth in subsection (2) of § 941.295. In the Committee's judgment, statutory exceptions are best handled as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove beyond a reasonable doubt, that 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).

A second set of exceptions was created by 2011 Wisconsin Act 35:

(2g) The prohibition in sub. (1m) on possessing or going armed with an electric weapon does not apply to any of the following:

- (a) A licensee or an out-of-state licensee.
- (b) An individual who goes armed with an electric weapon in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies.

Section 941.295(1c)(b) provides that "'licensee' has the meaning given in s. 175.60(1)(d)," which is: ". . . an individual holding a valid license to carry a concealed weapon issued under this section." Section 941.295(1c)(c) provides that "out-of-state licensee" has the meaning given in s. 175.60(1)(g).

1. Section 941.295(1m) applies to "whoever sells, transports, manufactures, possesses, or goes armed with any electric weapon." The instruction is drafted for a case involving "possession" because that appeared to the Committee to be the most likely charge and because "possess" is the most inclusive term.

2. 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). The Committee concluded that knowledge of the characteristics that make the weapon an electric weapon is not required. For an analogous situation, see Wis JI-Criminal 1341A, Possession Of A Machine Gun, note 2.

3. 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.

4. This is the definition provided in § 941.295(1c)(a).