

**1350 POSSESSION OF EXPLOSIVES FOR AN UNLAWFUL PURPOSE —  
§ 941.31(1)**

**Statutory Definition of the Crime**

Possession of explosives for unlawful purpose, as defined in § 941.31(1) of the Criminal Code of Wisconsin, is committed by one who possesses<sup>1</sup> any explosive compound with intent to use the explosive to commit a crime.<sup>2</sup>

**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 any explosive compound.

"Possessed" means that the defendant knowingly<sup>3</sup> had actual physical control<sup>4</sup> of the explosive compound.<sup>5</sup>

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.<sup>6</sup>

[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 possessed an explosive compound with the intent<sup>7</sup> to use the explosive to commit a crime.<sup>8</sup>

### **Deciding About Intent and Knowledge**

You cannot look into a person's mind to find intent and knowledge. Intent and 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 intent and 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 1350 was originally published in 1966 and revised in 1980, 1987, 1988, 1995, and 1996. This revision was approved by the Committee in March 2007 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is for violations of subsection (1) of § 941.31, which are punishable as Class F felonies. The statute was amended by 1987 Wisconsin Act 234, effective date: April 21, 1988, by adding subsection (2) which makes it a Class H felony if a person "makes, buys, sells, transports, possesses, uses or transfers any improvised explosive device, or possesses materials or components with intent to assemble any improvised explosive device." Section 941.31(2)(b). Wis JI-Criminal 1351A and 1351B are drafted for violations of sub. (2).

1. The instruction is drafted for a violation of the statute involving "possession." The statute also applies to one who "makes, buys, transports, or transfers, or offers to do the same." If one of the other alternatives is involved, the instruction must be modified (though most necessarily will involve possession).

Section 939.22(40) defines "transfer" as follows: "Transfer means any transaction involving a change in possession of any property or a change of right, title, or interest to or in any property."

2. The statute provides an alternative to possession with intent to commit a crime: "knowing that another intends to use it to commit a crime." If this alternative is used, the instruction must be modified. See note 6 below.

3. 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).

4. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases when an object is arguably under the defendant's control but not in his or her physical possession:

[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.

5. In State v. Brulport, 202 Wis.2d 506, 551 W.2d 824 (Ct. App. 1996), the court approved the use of Wisconsin Administrative Code definitions of "explosive compound" and "explosion" in a case involving a violation of § 941.31(1):

"Explosive compound" means any chemical compound, mixture or device, the primary of common purpose of which is to function by explosion. [§ ILHR 7.04(18)]

"Explosion" means the substantially instantaneous release of both gas and heat. [§ ILHR 7.04(18)]

Brulport argued on appeal that a plastic soda bottle containing aluminum foil and drain cleaner did not qualify as an "explosive compound" under § 941.31. The evidence showed that the combination of the ingredients produces a hydrogen gas which gradually, heats, expands and ultimately explodes. The court of appeals noted that "explosive compound" and "explosion" were not defined in the statutes and adopted definitions from the Wis. Administrative Code, Chapter ILHR 7. Applying these definitions, the court found that the devices in question qualified as an "explosive compound." The fact that a detonating or ignition mechanism is not required to trigger the explosion of these devices is not relevant; the definitions are satisfied if a "chemical compound, mixture or device" is present.

6. 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.

7. See Wis JI-Criminal 923A for a discussion of various issues relating to definition of "with intent to." "Knowing that another intends to use it to commit a crime" is an alternative mental element for this offense. The following may be a helpful explanation:

"With the knowledge that another intended to use the explosive to commit a crime" means that the defendant believed another intended to so use the explosives. With respect to the defendant's knowledge, you cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from acts, words, and statements, if any, and from all of the facts and circumstances in this case bearing upon knowledge or belief. To "know" that another intended to commit a crime requires merely that the defendant so believed.

8. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime. Section 939.12.