

1351A POSSESSION OF AN IMPROVISED EXPLOSIVE DEVICE — § 941.31(2)**Statutory Definition of the Crime**

Possession of an improvised explosive device, as defined in § 941.31(2) of the Criminal Code of Wisconsin, is committed by one who possesses¹ any improvised explosive device.

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 the device under (his) (her) actual physical control.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.³

[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 device was an improvised explosive device.⁴ This requires:

- that the device was explosive; that is, that it contained some type of explosive material⁵ and a means of detonating that material; and
- that the device was destructive; that is, that it was capable of causing bodily harm or damage to property; and
- that the device was improvised; that is, that it was made by a person not engaged in the legitimate manufacture or use of explosives (or otherwise authorized by law to do so).⁶

["Improvised explosive device" does not include ammunition for any rifle, pistol, or shotgun.]⁷

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

This instruction was originally published Wis JI-Criminal 1351 in 1988. It was revised and renumbered 1351A in 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 one type of violation of subsection (2) of § 943.31, which is punishable as a Class H felony. The statute was created by 1987 Wisconsin Act 234 (effective date: April 21, 1988). Possession of an improvised explosive device, also prohibited by § 941.31(2), is addressed by Wis JI-Criminal 1351A. Possession of an explosive compound with intent to use it to commit a crime is prohibited by § 943.31(1). See Wis JI-Criminal 1350.

Subsection (2)(c) of § 941.31 provides exceptions to the coverage of the statute:

This subsection does not apply to the transportation, possession, use or transfer of any improvised explosive device by any armed forces or national guard personnel or to any peace officer in the line of duty or as part of a duty-related function or exercise. The restriction on transportation in this subsection does not apply to common carriers.

1. The instruction is drafted for a violation of the statute involving "possession." The statute also applies to one who "makes, buys, transports, uses or transfers . . . or possesses materials or components with intent to assemble any improvised explosive device." 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. 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).

3. 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.

4. The explanation of "improvised explosive device" is from the definition provided in § 941.31(2)(a). The statutory definition appears to require that the device have the three attributes emphasized in the instruction: that it be explosive, destructive, and improvised. The full statutory definition reads as follows:

"Improvised explosive device" means a destructive explosive device capable of causing bodily harm, great bodily harm, death or property damage; with some type of explosive material and a means of detonating the explosive material, directly, remotely, or with a timer either present or readily capable of being inserted or attached; which may include a pipe or similar casing, with the ends of the pipe or casing capped, plugged or crimped, and a fuse or similar object sticking out of the pipe or casing; and made by a person not engaged in the legitimate manufacture or legitimate use of explosives, or otherwise authorized by law to do so. "Improvised explosive device" does not include ammunition for any rifle, pistol or shotgun.

5. In State v. Brulport, 202 Wis.2d 506,551 N.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 held that a plastic soda bottle containing aluminum foil and drain cleaner qualified as an "explosive compound" under § 941.31. See footnote 5, Wis JI-Criminal 1350.

6. The phrase in parentheses is based on the definition found in § 941.31(2)(a). See note 3, supra.

7. See s. 941.31(2)(a), note 4, supra.