

**1425B BURGLARY: ARMING ONESELF WITH A DANGEROUS WEAPON WHILE IN THE ENCLOSURE — § 943.10(1), (2)(b)**

[THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER WIS JI-CRIMINAL 1421 or 1424.]

The information alleges not only that the defendant committed the crime of burglary but also that the defendant armed (himself) (herself) with a dangerous weapon<sup>1</sup> while in the enclosure.

If you find the defendant guilty, you must answer the following question "yes" or "no":

"Did the defendant arm (himself) (herself) with a dangerous weapon while in the enclosure?"

"Dangerous weapon" means \_\_\_\_\_.<sup>2</sup>

"Armed" means that the defendant knowingly took physical control of a dangerous weapon.<sup>3</sup>

"Enclosure" means the building or room where the burglary was committed.<sup>4</sup>

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of burglary and that the defendant armed (himself) (herself) with a dangerous weapon while in the enclosure, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

**COMMENT**

Wis JI-Criminal 1425B was originally published in 1996 and revised in 2001. This revision was approved by the Committee in June 2004 and involved nonsubstantive editorial corrections.

Burglary, as defined in § 943.10(1), is punished as a Class C felony. The penalty increases to a Class B felony if a burglary is committed under any of the circumstances defined in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (covered by this instruction); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Thus, this instruction, or Wis JI-Criminal 1425A or Wis JI-Criminal 1425C, would be added to Wis JI-Criminal 1421, Burglary With Intent To Steal, or to Wis JI-Criminal 1424, Burglary With Intent To Commit A Felony.

The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of burglary, as defined in § 943.10, Wis. Stats., at the time and place charged in the information.

If you find the defendant guilty, answer the following question "yes" or "no":

Did the defendant arm (himself) (herself) with a dangerous weapon while in the enclosure?

This charge requires proof that the defendant armed himself while in the enclosure but does not require any further proof of a "nexus" between the weapon and the burglary offense. State v. Norris, 214 Wis.2d 25, 571 N.W.2d 857 (Ct. App. 1997).

1. Subsection 943.10(2)(a) was amended by 1995 Wisconsin Act 288 (effective date: May 10, 1996) to refer not only to dangerous weapons but also to "a device or container described under s. 941.26(4)(a)." The reference is to containers of oleoresin of capsicum, commonly referred to as "pepper spray." If that option is presented, the instruction must be modified. The Committee suggests simply substituting "container of oleoresin of capsicum" for "dangerous weapon" and not defining the term further. This is the approach used in the instructions for violations of § 941.26(4); see Wis JI-Criminal 1341, 1341A, and 1341B.

2. The Committee suggests using the part of the statutory definition that applies to the facts of the case. "Dangerous weapon" is defined as follows in § 939.22(10):

(10) "Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

For example, if the evidence shows a firearm was used, the sentence at note 1 would read: "'Dangerous weapon' means any firearm, whether loaded or unloaded." Similar statements should be used for the other alternatives provided by the statutory definition. See Wis JI-Criminal 910 for suggested instructions for the other alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

3. The definition of "armed" is adapted from that used in other uniform instructions for offenses having "armed" as an element. See, for example, Wis JI-Criminal 1335, Carrying A Concealed Weapon.

It differs from those other definitions in that it requires that the defendant actually take physical control of a weapon. The Committee concluded that such a requirement was necessary in the context of this offense – simply being aware of the presence of the weapon is not sufficient.

4. The definition assumes the burglary took place in a building or dwelling. Other alternatives are possible, such as enclosed railroad cars, enclosed portions of a ship or vessel, etc. See § 943.10(1)(b) - (e) and note 2, Wis JI-Criminal 1421. If other than a building is involved, this definition should be eliminated or modified.