

**1431 POSSESSION OF BURGLARIOUS TOOLS — § 943.12****Statutory Definition of the Crime**

Possession of burglarious tools, as defined in § 943.12 of the Criminal Code of Wisconsin, is committed by one who has in personal possession any device or instrumentality intended, designed, or adapted for use in breaking into any depository designed for the safekeeping of any valuables or into any building or room with intent to use such device or instrumentality to break into a depository, building, or room and to steal therefrom.

**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 three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had possession<sup>1</sup> of a tool or device.

"Possession" means that the defendant knowingly<sup>2</sup> had actual physical control<sup>3</sup> of the tool or device.

2. The tool or device was suitable for use<sup>4</sup> in breaking into a building.<sup>5</sup> This may include common and special tools and devices.
3. The defendant intended to use the tool or device to break into a building with intent to steal.

This means that the defendant must have possessed the tool or device for the purpose of using it to break into a building with the intent to take and carry away movable property of another without consent and with intent to deprive the owner permanently of possession of such property.<sup>6</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 knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three 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 1431 was originally published in 1966 and revised in 1979, 1984, 1987, and 1995. This revision was approved by the Committee in December 2007 and involved adoption of a new format and nonsubstantive changes to the text.

In Dumas v. State, 90 Wis.2d 518, 280 N.W.2d 310 (Ct. App. 1979), the court affirmed convictions for both burglary and possession of burglarious tools where the defendant was apprehended inside the burglarized building, while the burglary was in progress, with a tire iron and a crowbar in his possession.

1. A change made in § 943.12 by Chapter 173, Laws of 1977, was to "in personal possession" from "in his possession." The Committee has concluded that this change was intended only to eliminate the use of the masculine pronoun in the statute and not to change the substance of the offense.

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 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. The Committee concluded that "suitable for use" was an appropriate substitute for the statutory language "intended, designed, or adapted." Chapter 173, Laws of 1977, introduced the latter language for the previously existing "designed and adapted." This substantially broadened the coverage of the statute (and was accompanied by a substantial reduction in the maximum penalty – from 10 to 2 years). The broader concept seems to be equivalent to "suitable for use," a construction that should be easier for the jury to understand (and which had been used in the 1953 draft of the proposed Criminal Code revision).

"The clear legislative intent [of § 943.12] was to make criminal the possession of any device designed for the criminal purpose of an illegal entry when that possession was coupled with the intent to use a device for the prohibited purpose." Perkins v. State, 61 Wis.2d 341, 350-51, 212 N.W.2d 141 (1973) (affirming a conviction based on the possession of a homemade key used to open parking meters). Also see Hansen v. State, 64 Wis.2d 541, 219 N.W.2d 246 (1974), finding the evidence sufficient to support a conviction based on the possession of a crowbar, gloves, and socks.

5. The instruction is drafted in terms of "breaking into a building," but the statute also covers a "room" and "any depository designed for the safekeeping of any valuables." If a "room" or "depository" is involved, that term should be substituted for "building" throughout the instruction.

6. Evidence of prior burglary convictions was held to be admissible as relevant to the intent issue in State v. Vanlue, 96 Wis.2d 81, 291 N.W.2d 467 (1980).