

**2176 POSSESSION OF A DANGEROUS WEAPON BY A CHILD¹ —
§ 948.60(2)(a)**

Statutory Definition of the Crime

Possession of a dangerous weapon by a child, as defined in § 948.60(2)(a) of the Criminal Code of Wisconsin, is committed by any child who possesses or goes armed with a dangerous weapon.

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 possessed an object.²

"Possessed" means that the defendant knowingly had the object under (his) (her) actual physical control.³

2. The object was a dangerous weapon.

A _____ is a dangerous weapon.⁴

3. The defendant had not attained the age of 18 years⁵ at the time (he) (she) allegedly possessed a dangerous weapon.

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 2176 was originally published in 1989 and revised in 1991, 1992, 1998, and 2009. This revision was approved by the Committee in October 2011; it corrected a statutory cross-reference in footnote 4 to reflect a change made by 2011 Wisconsin Act 35.

This instruction is for a violation of § 948.60(2)(a). Section 948.60 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1325 which applied to what was essentially the same offense under § 941.22, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.60 was amended by 1991 Wisconsin Act 18 (see note 4, below) and by 1991 Wisconsin Act 139. The latter divided what was formerly sub. (2) into sub (2)(a) and (b). For violations of § 948.60(2)(b) involving selling a dangerous weapon to a child, see Wis JI-Criminal 2177.

The statute provides an exception for possession by a child in a course of instruction in the traditional and proper use of the weapon under adult supervision. See § 948.60(3)(a). Additional exceptions are recognized in subsections (3)(b) and (c); they were added by 1991 Wisconsin Act 18, effective date: June 8, 1991. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. This instruction is for the offense defined by § 948.60(2)(a) that can be committed only by a child. Section 948.60(2)(d) provides: "A person under 17 years of age who has violated this subsection is subject to the provisions of Ch. 938 unless jurisdiction is waived under s. 938.18 or the person is subject to the jurisdiction of a court of criminal jurisdiction under s. 938.183."

2. The statute applies to any child "who possesses or goes armed with" a dangerous weapon. (Former § 941.22 referred only to "goes armed with.") By adding the alternative of simple possession, the revision appears to make "goes armed with" superfluous. To the extent the two terms have a different meaning, "possess" is the more inclusive one. See the discussion of "goes armed with" in Wis JI-Criminal 1335.

3. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with

approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

"Knowingly" is used because 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). Also see Wis JI-Criminal 6000, Note on the Knowledge Requirement in Controlled Substances Cases.

4. "Dangerous weapon" is specially defined for purposes of this offense; the definition in § 939.22(10) does not apply. Section 948.60(1) provides:

In this section, "dangerous weapon" means any firearm loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

This definition is essentially a list of seven objects that constitute a dangerous weapon for purposes of this offense. The Committee recommends inserting the name of the object into the instruction rather than reading the complete statutory definition. Note that many items that would qualify as dangerous weapons under § 939.22(10) do not fall within this definition.

The definition was amended by 1991 Wisconsin Act 18 (effective date: June 8, 1991) to substitute "loaded or unloaded" for "having a barrel less than 12 inches long" immediately after the word "firearm" in the first line of the definition.

5. "Child" is defined in this way in § 948.01(1).