

**2185 RECKLESSLY STORING A FIREARM — § 948.55(2)****Statutory Definition of the Crime**

Section 948.55(2) of the Criminal Code of Wisconsin is violated by any person who recklessly stores or leaves a loaded firearm within the reach or easy access of a child and the child obtains the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child and the child discharges the firearm and the discharge causes bodily harm or death to himself, herself, or another.

**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 recklessly stored or left a loaded firearm within the reach or easy access of a child.

"Child" means a person who has not attained the age of 14 years.<sup>1</sup>

A "firearm" is a weapon that acts by force of gunpowder.<sup>2</sup>

"Recklessly" means that the defendant's storing or leaving of the firearm created an unreasonable and substantial risk of death or great bodily harm to another human being and the defendant was aware of that risk.<sup>3</sup>

2. A child obtained the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child.
3. The child discharged the firearm and the discharge caused (bodily harm) (death) to (the child) (another person).<sup>4</sup>

### 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 2185 was approved by the Committee in December 2012.

This instruction is for a violation of subsec. (2) of § 948.55, which is punished as a Class A misdemeanor. Subsection 948.55 was created by 1991 Wisconsin Act 139, effective date: April 16, 1992.

Subsections (4)(a) through (h) set forth exceptions to the applicability of § 948.55(2). Also see note 4, below. 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 (1961).

1. Section 948.55(1).
2. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1882). This definition excludes airguns.
3. This is the definition of "criminal recklessness" provided in § 939.24(1). "If criminal recklessness is an element of a crime in Chs. 939 to 951, the recklessness is indicated by the term 'reckless' or 'recklessly.'" Section 939.24(2). Section 948.55(2) uses the term "recklessly."

4. Section 948.55(5) provides that "[s]ubsection (2) does not apply if the bodily harm or death resulted from an accident that occurs while the child is using the firearm in accordance with § 29.304 or 948.60(3)." Section 29.304 relates to parental supervision and hunter education and firearm safety programs for persons under 16 years of age; § 948.60(3) refers to target practice and instruction in proper use of weapons under the supervision of adults. See the Comment preceding note 1, supra, relating to the recommended treatment of such statutory exceptions.