CHAPTER 939

CRIMES — GENERAL PROVISIONS

SUBCHAPTER I
PRELIMINARY PROVISIONS
939.01 Name and interpretation.
939.03 Jurisdiction of state over crime.
939.05 Parties to crime.
939.10 Common law crimes abolished; common law rules preserved.
939.12 Crime defined.
939.14 Criminal conduct or contributory negligence of victim no defense.
939.20 Provisions which apply only to chapters 939 to 951.
939.22 Words and phrases defined.
939.23 Criminal intent.
939.24 Criminal recklessness.
939.25 Criminal negligence.
SUBCHAPTER II
INCHOATE CRIMES
939.30 Solicitation.
939.31 Conspiracy.
939.32 Attempt.
SUBCHAPTER III
DEFENSES TO CRIMINAL LIABILITY
939.42 Intoxication.
939.43 Mistake.
939.44 Adequate provocation.
939.45 Privilege.
939.46 Coercion.
939.47 Necessity.
939.48 Self−defense and defense of others.
939.49 Defense of property and protection against retail theft.
SUBCHAPTER IV
PENALTIES
939.50 Classification of felonies.
939.51 Classification of misdemeanors.
939.52 Classification of forfeitures.
939.60 Felony and misdemeanor defined.
939.61 Penalty when none expressed.
939.615 Lifetime supervision of serious sex offenders.
939.616 Mandatory minimum sentence for child sex offenses.
939.617 Minimum sentence for certain child sex offenses.
939.618 Mandatory minimum sentence for repeat serious sex crimes.
939.619 Mandatory minimum sentence for repeat serious violent crimes.
939.62 Increased penalty for habitual criminality.
939.621 Increased penalty for certain domestic abuse offenses.
939.63 Penalties; use of a dangerous weapon.
939.632 Penalties; violent crime in a school zone.
939.635 Increased penalty for certain crimes against children committed by a child care provider.
939.645 Penalty; crimes committed against certain people or property.
SUBCHAPTER V
RIGHTS OF THE PROSECUTION
939.65 Prosecution under more than one section permitted.
939.66 Conviction of included crime permitted.
SUBCHAPTER VI
RIGHTS OF THE ACCUSED
939.70 Presumption of innocence and burden of proof.
939.71 Limitation on the number of convictions.
939.72 No conviction of both inchoate and completed crime.
939.73 Criminal penalty permitted only on conviction.
939.74 Time limitations on prosecutions.
939.75 Death or harm to an unborn child.

Cross−reference: See definitions in s. 939.22.

NOTE: 1987 Wis. Act 399 included changes in homicide and lesser included offenses. The sections affected had previously passed the senate as 1987 Senate Bill 191, which was prepared by the Judicial Council and contained explanatory notes. These notes have been inserted following the sections affected and are credited to SB 191 as "Bill 191−S".

SUBCHAPTER I

PRELIMINARY PROVISIONS

939.01 Name and interpretation. Chapters 939 to 951 may be referred to as the criminal code but shall not be interpreted as a unit. Crimes committed prior to July 1, 1956, are not affected by chs. 939 to 951.

History: 1979 c. 89; 1987 a. 332 s. 64.

939.03 Jurisdiction of state over crime. (1) A person is subject to prosecution and punishment under the law of this state if any of the following applies:

(a) The person commits a crime, any of the constituent elements of which takes place in this state.

(b) While out of this state, the person aids and abets, conspires with, or advises, incites, commands, or solicits another to commit a crime in this state.

(c) While out of this state, the person does an act with intent that it cause in this state a consequence set forth in a section defining a crime.

(d) While out of this state, the person steals and subsequently brings any of the stolen property into this state.

(e) The person violates s. 943.201 or 943.203 and the victim, at the time of the violation, is an individual who resides in this state, a deceased individual who resided in this state immediately before his or her death, or an entity, as defined in s. 943.203 (1) (a), that is located in this state.

(f) The person violates s. 943.89 and the matter or thing is deposited for delivery within this state or is received or taken within this state.

(g) The person violates s. 943.90 and the transmission is from within this state, the transmission is received within this state, or it is reasonably foreseeable that the transmission will be accessed by a person or machine within this state.

(2) In this section "state" includes area within the boundaries of the state, and area over which the state exercises concurrent jurisdiction under article IX, section 1, of the constitution.

History: 1983 a. 192; 1993 a. 486; 2003 a. 36; 2005 a. 212.

Jurisdiction over a crime committed by a Menominee Indian while on the Menominee Indian Reservation is discussed. State ex rel. Pyatskowit v. Montour, 72 Wis. 2d 277, 240 N.W.2d 186 (1976).

Treaties between the federal government and Menominee tribe do not deprive the state of criminal subject matter jurisdiction over a crime committed by a Menominee outside the reservation. Sturdevant v. State, 76 Wis. 2d 247, 251 N.W.2d 50 (1977).

Trial courts do not have subject matter jurisdiction to convict defendants under unconstitutionally vague statutes. State ex rel. Skinkis v. Treffert, 90 Wis. 2d 528, 280 N.W.2d 316 (Ct. App. 1979).

A fisherman who violated Minnesota and Wisconsin fishing laws while standing on the Minnesota bank of the Mississippi River was subject to Wisconsin prosecution. State v. Nelson, 92 Wis. 2d 855, 285 N.W.2d 924 (Ct. App. 1979)

The state has exclusive jurisdiction over 2nd−offense drunk driving. A 2nd offender may not be charged as a 1st offender under a local ordinance. County of Walworth v. Rohner, 108 Wis. 2d 713, 324 N.W.2d 682 (1982). But see City of Eau Claire v. Booth, 2016 WI 65, ___ Wis. 2d ___, 882 N.W.2d 738, 15−0869.

An unlawful arrest does not deprive a court of personal jurisdiction over a defendant. State v. Smith, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).

Jurisdiction in a criminal nonsupport action under s. 948.22 does not require that the child to be supported be a resident of Wisconsin during the charged period. State v. Gantt, 201 Wis. 2d 206, 548 N.W.2d 134 (Ct. App. 1996), 95−2469.

Objections to subject matter jurisdiction that turn on a question of law may not be waived by a guilty plea, but objections to subject matter jurisdiction based on a factual dispute do not survive. State v. Bratrud, 204 Wis. 2d 445, 555 N.W.2d 662 (Ct. App. 1995), 94−3402.

A trial court did not lose subject matter jurisdiction over a count in a criminal complaint when an oral amendment of the count did not include one of the elements of the new offense. State v. Diehl, 205 Wis. 2d 1, 555 N.W.2d 174 (Ct. App. 1996), 95−2444.

A sentencing court is accorded incidental powers necessary to carry out its judicial functions and may modify an improper sentence, but it is not competent to enter a money judgment against the state for the recovery of improperly collected restitution under an improper sentence. State v. Minniecheske, 223 Wis. 2d 493, 590 N.W.2d 17 (Ct. App. 1998), 98−1369.

For purposes of jurisdictional analysis, the defendant father's concealment in Canada of a child taken from the child's mother in Wisconsin was inseparable from the consequences of the concealment in Wisconsin, thus giving a Wisconsin court jurisdiction under sub. (1) (c) to try the defendant for a violation of s. 948.31. State v. Inglin, 224 Wis. 2d 764, 592 N.W.2d 666 (Ct. App. 1999), 97−3091.

This section relates to both personal and territorial jurisdiction. When a trial court validly acquired territorial jurisdiction over the charged crime, it could not lose jurisdiction over a lesser−included crime. State v. Randle, 2002 WI App 116, 2002 WI App 116, 252 Wis. 2d 743, 647 N.W.2d 324, 01−1448.

If there is no serious evidentiary dispute that the trial court has territorial jurisdiction, a special instruction on territorial jurisdiction need not be given to the jury. A person may be prosecuted for doing an act outside this state that has a criminally proscribed consequence within the state. State v. Brown, 2003 WI App 34, 260 Wis. 2d 125, 659 N.W.2d 110, 02−1000.

The constituent elements of an offense under sub. (1) (a) are those elements of the criminal offense that the state is required to prove beyond a reasonable doubt in the prosecution of the offense. A constituent element of a criminal offense may be either the wrongful deed that comprises the physical component or the state of mind that the prosecution must prove that a defendant had. For 1st−degree homicide, sub. (1) (a) is satisfied upon proof that the defendant committed an act in Wisconsin manifesting the intent to kill. State v. Anderson, 2005 WI 54, 280 Wis. 2d 104, 695 N.W.2d 731, 03−3478.

939.05 Parties to crime. (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if the person:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

History: 1993 a. 486.

It is desirable, but not mandatory, that an information refer to this section if the district attorney knows in advance that a conviction can only be based on participation and the court can instruct and the defendant can be convicted on the basis of this section in the absence of a showing of adverse effect on the defendant. Bethards v. State, 45 Wis. 2d 606, 173 N.W.2d 634 (1970).

It is not error that an information charging a crime does not also charge the defendant with being a party to a crime. Nicholas v. State, 49 Wis. 2d 683, 183 N.W.2d 11 (1973).

Under sub. (2) (c), a conspirator is one who is concerned with a crime prior to its actual commission. State v. Haugen, 52 Wis. 2d 791, 191 N.W.2d 12.

A complaint charging the defendant as a party to the crime of theft that alleged that an unidentified man stole property and gave it to the defendant who passed it on was insufficient. There must be an allegation that the defendant knew of the commission of the crime. State v. Haugen, 52 Wis. 2d 791, 191 N.W.2d 12 (1971).

An information charging the defendant with being a party to a crime need not set forth the particular subsection relied upon. A defendant can be convicted of 1st−degree murder under this statute even though the defendant claimed only intending to rob and that an accomplice did the shooting. State v. Cydzik, 60 Wis. 2d 683, 211 N.W.2d 421 (1973).

The state need not elect as to which of the elements of the charge it is relying on. Hardison v. State, 61 Wis. 2d 262, 212 N.W.2d 103 (1973).

Conduct undertaken to intentionally aid another in the commission of a crime that yields such assistance constitutes aiding and abetting the crime and whatever it entails as a natural consequence. State v. Asfoor, 75 Wis. 2d 411, 249 N.W.2d 529 (1977).

Defendants may be found guilty under sub. (2) if, between them, they perform all of the necessary elements of the crime with awareness of what the others are doing; each defendant need not be present at the scene of the crime. Roehl v. State, 77 Wis. 2d 398, 253 N.W.2d 210 (1977).

There are 2 party−to−a−crime theories. Aiding and abetting under sub. (2) (b) and conspiracy under sub. (2) (c). State v. Charbarneau, 82 Wis. 2d 644, 264 N.W.2d 227 (1978).

Withdrawal from a conspiracy under sub. (2) (c) must be timely. Zelenka v. State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978).

This section applies to all crimes unless legislative intent clearly indicates otherwise. State v. Tronca, 84 Wis. 2d 68, 267 N.W.2d 216 (1978).

Proof of a "stake in the venture" is not needed to convict under sub. (2) (b). Krueger v. State, 84 Wis. 2d 272, 267 N.W.2d 602 (1978).

Multiple conspiracies and single conspiracies are distinguished. Bergeron v. State, 85 Wis. 2d 595, 271 N.W.2d 386 (1978).

A jury need not unanimously agree whether the defendant: 1) directly committed the crime; 2) aided and abetted its commission; or 3) conspired with another to commit it. Holland v. State, 91 Wis. 2d 134, 280 N.W.2d 288 (1979).

An aider and abettor who withdraws from a conspiracy does not remove himself or herself from aiding and abetting. May v. State, 97 Wis. 2d 175, 293 N.W.2d 478 (1980).

A party to a crime is guilty of that crime whether or not that party intended the crime or had the intent of its perpetrator. State v. Stanton, 106 Wis. 2d 172, 316 N.W.2d 134 (Ct. App. 1982.)

The elements of aiding and abetting are undertaking conduct that will aid another in the execution of the crime and a conscious desire that the conduct will yield that aid. State v. Hecht, 116 Wis. 2d 605, 342 N.W.2d 721 (1984).

The jury need not unanimously agree as to in which of the alternative ways under sub. (2) a defendant has committed the offense under the party to the crime theory. While there may be distinctions between aiding abetting and conspiracy, the distinctions are often blurred. State v. Hecht, 116 Wis. 2d 605, 342 N.W.2d 721 (1984).

Testimony concerning a party to the crime defendant's whereabouts during planning sessions for the crime was not an alibi and did not require a notice of alibi under s. 971.23 (8). State v. Horenberger, 119 Wis. 2d 237, 349 N.W.2d 692 (1984).

Depending on the facts of the case, armed robbery can be a natural and probable consequence of a robbery. In that case, an aider and abettor need not have had actual knowledge that the principals would be armed. State v. Ivey, 119 Wis. 2d 591, 350 N.W.2d 622 (1984).

Sub. (2) (c) may be violated where the defendant solicits a 2nd person to procure a 3rd person to commit a crime. State v. Yee, 160 Wis. 2d 15, 465 N.W.2d 260 (Ct. App. 1990).

Individual officers are personally responsible for criminal acts committed in the name of a corporation. State v. Kuhn, 178 Wis. 2d 428, 504 N.W.2d 405 (Ct. App. 1993).

A defendant may be guilty of felony murder, party to a crime, if the defendant participates with an accomplice in a felony listed in s. 940.03 and the accomplice kills another. There is no requirement that the defendant have an intent to kill or directly cause the death. State v. Rivera, 184 Wis. 2d 485, 516 N.W.2d 391 (1994), State v. Chambers, 183 Wis. 2d 316, 515 N.W.2d 531 (Ct. App. 1994), State v. Oimen, 184 Wis. 2d 423, 516 N.W.2d 399 (Ct. App. 1994).

There is a distinction between conspiracy as a substantive inchoate crime under s. 939.31 and conspiracy as a theory of prosecution for a substantive crime under s. 939.05 (2) (c). State v. Jackson, 2005 WI App 104, 281 Wis. 2d 137, 701 N.W.2d 42, 04−1603.

The unanimity requirement was satisfied when the jury unanimously found that the accused participated in the crime. Lampkins v. Gagnon, 710 F. 2d 374 (1983).

This section does not shift the burden of proof. The prosecution need not specify which paragraph of sub. (2) it intends to proceed under. Madden v. Israel, 478 F. Supp. 1234 (1979).

Liability for coconspirator's crimes in the Wisconsin party to a crime statute. 66 MLR 344 (1983).

Application of Gipson's unanimous verdict rationale to the Wisconsin party to a crime statute. 1980 WLR 597.

Wisconsin's party to a crime statute: The mens rea element under the aiding and abetting subsection, and the aiding and abetting−choate conspiracy distinction. 1984 WLR 769.

939.10 Common law crimes abolished; common law rules preserved. Common law crimes are abolished. The common law rules of criminal law not in conflict with chs. 939 to 951 are preserved.

History: 1979 c. 89; 1987 a. 332 s. 64; 2007 a. 97.

The common law privilege to forcibly resist an unlawful arrest is abrogated. State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), 96−0914.

939.12 Crime defined. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

939.14 Criminal conduct or contributory negligence of victim no defense. It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent.

A jury instruction that a defrauded party had no duty to investigate fraudulent representations was correct. Lambert v. State, 73 Wis. 2d 590, 243 N.W.2d 524 (1976).

This section does not prevent considering the victim's negligence in relation to causation. This section only means that a defendant is not immune from prosecution merely because the victim has been negligent. State v. Lohmeier, 205 Wis. 2d 183, 556 N.W.2d 90 (1996), 94−2187.

939.20 Provisions which apply only to chapters 939 to 951. Sections 939.22 to 939.25 apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 apply to crimes defined

in other chapters of the statutes as well as to those defined in chs. 939 to 951.

History: 1979 c. 89; 1987 a. 332 s. 64; 1987 a. 399, 403.

939.22 Words and phrases defined. In chs. 939 to 948 and 951, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction or the word or phrase is defined in s. 948.01 for purposes of ch. 948:

(2) "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas.

(3) "Alcohol concentration" has the meaning given in s. 340.01 (1v).

(4) "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

(5) "Commission warden" means a conservation warden employed by the Great Lakes Indian Fish and Wildlife Commission.

(6) "Crime" has the meaning designated in s. 939.12.

(9) "Criminal gang" means an ongoing organization, association or group of 3 or more persons, whether formal or informal, that has as one of its primary activities the commission of one or more of the criminal acts, or acts that would be criminal if the actor were an adult, specified in s. 939.22 (21) (a) to (s); that has a common name or a common identifying sign or symbol; and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(9g) "Criminal gang member" means any person who participates in criminal gang activity, as defined in s. 941.38 (1) (b), with a criminal gang.

(9r) "Criminal intent" has the meaning designated in s. 939.23.

(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 ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon, as defined in s. 941.295 (1c) (a); 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.

(11) "Drug" has the meaning specified in s. 450.01 (10).

(12) "Felony" has the meaning designated in s. 939.60.

(14) "Great bodily harm" means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

(15) "Hazardous inhalant" means a substance that is ingested, inhaled, or otherwise introduced into the human body in a manner that does not comply with any cautionary labeling that is required for the substance under s. 100.37 or under federal law, or in a manner that is not intended by the manufacturer of the substance, and that is intended to induce intoxication or elation, to stupefy the central nervous system, or to change the human audio, visual, or mental processes.

(16) "Human being" when used in the homicide sections means one who has been born alive.

(18) "Intentionally" has the meaning designated in s. 939.23.

(19) "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.

(20) "Misdemeanor" has the meaning designated in s. 939.60.

(20d) "Offense against an elderly or vulnerable person" means a violation of s. 940.285 (2) (a) that caused death, great bodily harm, or bodily harm to the victim or s. 940.295 (3) (b) that caused death, great bodily harm, or bodily harm to the victim.

(20m) "Offense related to ethical government" means a violation of s. 13.69 (6m), 19.58 (1) (b), or 946.12.

(20s) "Offense related to school safety" means a violation of s. 948.605 or 948.61 (2) (b).

(21) "Pattern of criminal gang activity" means the commission of, attempt to commit or solicitation to commit 2 or more of the following crimes, or acts that would be crimes if the actor were an adult, at least one of those acts or crimes occurs after December 25, 1993, the last of those acts or crimes occurred within 3 years after a prior act or crime, and the acts or crimes are committed, attempted or solicited on separate occasions or by 2 or more persons:

(a) Manufacture, distribution or delivery of a controlled substance or controlled substance analog, as prohibited in s. 961.41 (1).

(b) First−degree intentional homicide, as prohibited in s. 940.01.

(c) Second−degree intentional homicide, as prohibited in s. 940.05.

(d) Battery, as prohibited in s. 940.19 or 940.195.

(e) Battery, special circumstances, as prohibited in s. 940.20.

(em) Battery or threat to witness, as prohibited in s. 940.201.

(f) Mayhem, as prohibited in s. 940.21.

(g) Sexual assault, as prohibited in s. 940.225.

(h) False imprisonment, as prohibited in s. 940.30.

(i) Taking hostages, as prohibited in s. 940.305.

(j) Kidnapping, as prohibited in s. 940.31.

(k) Intimidation of witnesses, as prohibited in s. 940.42 or 940.43.

(L) Intimidation of victims, as prohibited in s. 940.44 or 940.45.

(m) Criminal damage to property, as prohibited in s. 943.01.

(mg) Criminal damage to or threat to criminally damage the property of a witness, as prohibited in s. 943.011 or 943.017 (2m).

(n) Arson of buildings or damage by explosives, as prohibited in s. 943.02.

(o) Burglary, as prohibited in s. 943.10.

(p) Theft, as prohibited in s. 943.20.

(q) Taking, driving or operating a vehicle, or removing a part or component of a vehicle, without the owner's consent, as prohibited in s. 943.23.

(r) Robbery, as prohibited in s. 943.32.

(s) Sexual assault of a child, as prohibited in s. 948.02.

(t) Repeated acts of sexual assault of the same child, as prohibited in s. 948.025.

(u) Sexual assault of a child placed in substitute care under s. 948.085.

(22) "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes. "Peace officer" includes a commission warden and a university police officer, as defined in s. 175.42 (1) (b).

(23) "Petechia" means a minute colored spot that appears on the skin, eye, eyelid, or mucous membrane of a person as a result of localized hemorrhage or rupture to a blood vessel or capillary.

(24) "Place of prostitution" means any place where a person habitually engages, in public or in private, in nonmarital acts of sexual intercourse, sexual gratification involving the sex organ of one person and the mouth or anus of another, masturbation or sexual contact for anything of value.

(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.

(30) "Public officer"; "public employee". A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units. A "public employee" is any person, not an officer, who per-

forms any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

(32) "Reasonably believes" means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous.

(33) "Restricted controlled substance" means any of the following:

(a) A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.

(b) A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in par. (a).

(c) Cocaine or any of its metabolites.

(d) Methamphetamine.

(e) Delta−9−tetrahydrocannabinol.

(34) "Sexual contact" means any of the following if done for the purpose of sexual humiliation, degradation, arousal, or gratification:

(a) The intentional touching by the defendant or, upon the defendant's instruction, by a third person of the clothed or unclothed intimate parts of another person with any part of the body, clothed or unclothed, or with any object or device.

(b) The intentional touching by the defendant or, upon the defendant's instruction, by a third person of any part of the body, clothed or unclothed, of another person with the intimate parts of the body, clothed or unclothed.

(c) The intentional penile ejaculation of ejaculate or the intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by a third person upon any part of the body, clothed or unclothed, of another person.

(d) Intentionally causing another person to ejaculate or emit urine or feces on any part of the actor's body, whether clothed or unclothed.

(36) "Sexual intercourse" requires only vulvar penetration and does not require emission.

(37) "State−certified commission warden" means a commission warden who meets the requirements of s. 165.85 (4) (a) 1., 2., and 7. and has agreed to accept the duties of a law enforcement officer under the laws of this state.

(38) "Substantial bodily harm" means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

(40) "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.

(42) "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage, hazardous inhalant, of a controlled substance or controlled substance analog under ch. 961, of any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or of any other drug, or of an alcohol beverage and any other drug.

(44) "Vehicle" means any self−propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

(46) "With intent" has the meaning designated in s. 939.23.

(48) "Without consent" means no consent in fact or that consent is given for one of the following reasons:

(a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on the victim, or on a person in the victim's presence, or on a member of the victim's immediate family; or

(b) Because the actor purports to be acting under legal authority; or

(c) Because the victim does not understand the nature of the thing to which the victim consents, either by reason of ignorance or mistake of fact or of law other than criminal law or by reason of youth or defective mental condition, whether permanent or temporary.

History: 1971 c. 219; 1973 c. 336; 1977 c. 173; 1979 c. 89, 221; 1981 c. 79 s. 17; 1981 c. 89, 348; 1983 a. 17, 459; 1985 a. 146 s. 8; 1987 a. 332, 399; 1993 a. 98, 213, 227, 441, 486; 1995 a. 69, 436, 448; 1997 a. 143, 295; 2001 a. 109; 2003 a. 97, 223; 2005 a. 273, 277, 435; 2007 a. 27, 97, 127; 2009 a. 28, 276; 2011 a. 35; 2013 a. 83, 214, 265.

It was for the jury to determine whether a soft drink bottle, with which the victim was hit on the head, constituted a dangerous weapon. Actual injury to the victim is not required. Langston v. State, 61 Wis. 2d 288, 212 N.W.2d 113 (1973).

An unloaded pellet gun qualified as a "dangerous weapon" under sub. (10) in that it was designed as a weapon and, when used as a bludgeon, was capable of producing great bodily harm. State v. Antes, 74 Wis. 2d 317, 246 N.W.2d 671 (1976).

A jury could reasonably find that numerous cuts and stab wounds constituted "serious bodily injury" under sub. (14) even though there was no probability of death, no permanent injury, and no damage to any member or organ. The phrase, "or other serious bodily injury," was designed as an intentional broadening of the scope of the statute to include bodily injuries that were serious, although not of the same type or category as those recited in the statute. La Barge v. State, 74 Wis. 2d 327, 246 N.W.2d 794 (1976).

A jury must find that acts of prostitution were repeated or were continued in order to find that premises are "a place of prostitution" under sub. (24). Johnson v. State, 76 Wis. 2d 672, 251 N.W.2d 834 (1977).

Sub. (14), either on its face or as construed in *La Barge*, is not unconstitutionally vague. Cheatham v. State, 85 Wis. 2d 112, 270 N.W.2d 194 (1978).

Definitions of "under the influence" in this section and in s. 346.63 (1) (a) are equivalent. State v. Waalen, 130 Wis. 2d 18, 386 N.W.2d 47 (1986).

To determine whether an infant was "born alive" under sub. (16), the s. 146.71 standard to determine death is applied, as, "if one is not dead he is indeed alive." State v. Cornelius, 152 Wis. 2d 272, 448 N.W.2d 434 (Ct. App. 1989).

A dog may be a dangerous weapon under sub. (10). State v. Sinks, 168 Wis. 2d 245, 483 N.W.2d 286 (Ct. App. 1992).

Portions of the defendant's anatomy are not dangerous weapons under sub. (10). State v. Frey, 178 Wis. 2d 729, 505 N.W.2d 786 (Ct. App. 1993).

An automobile may constitute a dangerous weapon under sub. (10). State v. Bidwell, 200 Wis. 2d 200, 546 N.W.2d 507 (Ct. App. 1996), 95−0791.

A firearm with a trigger lock is within the definition of a dangerous weapon under sub. (10). State v. Norris, 214 Wis. 2d 25, 571 N.W.2d 857 (Ct. App. 1997), 96−2158.

When a mother agreed to the father taking a child on a camping trip, but the father actually intended to permanently take the child and did abscond to Canada with the child, the child was taken based on the mother's "mistake of fact," which under s. 939.22 (48) rendered the taking of the child to be "without consent" and in violation of s. 948.31. State v. Inglin, 224 Wis. 2d 764, 592 N.W.2d 666 (Ct. App. 1999), 97−3091.

The definitions in subs. (9) and (9g) are sufficiently specific that when incorporated into a probation condition they provide fair and adequate notice as to the expected course of conduct and provide an adequate standard of enforcement. State v. Lo, 228 Wis. 2d 531, 599 N.W.2d 659 (Ct. App. 1999), 98−2490.

Sub. (19) includes female and male breasts as each is "the breast of a human being." The touching of a boy's breast constitutes "sexual contact" within the meaning of s. 948.02 (2). State v. Forster, 2003 WI App 29, 260 Wis. 2d 149, 659 N.W.2d 144, 02−0602.

"Materially impaired" as used in sub. (42) does not have a technical or peculiar meaning in the law beyond the time−tested explanations in standard jury instructions. Therefore, the circuit court's response to the jury question to give all words not otherwise defined their ordinary meaning was not error, comported with s. 990.01, and did not constitute an erroneous exercise of discretion. State v. Hubbard, 2008 WI 92, 313 Wis. 2d 1, 752 N.W.2d 839, 06−2753.

Shooting a person in the thigh at a range of 16 to 18 feet with a shotgun is practically certain to cause at least a protracted loss or impairment of the function of the victim's leg, and is injury constituting "great bodily harm" within the meaning of sub. (14). The fact that the defendant's conduct was intended to neutralize the threat posed by the victim did not negate the fact that, by firing the shotgun at the victim's thigh, the defendant intended to cause great bodily harm by committing an act that he was aware was practically certain to result in great bodily harm to the victim. State v. Miller, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, 07−1052.

939.23 Criminal intent. (1) When criminal intent is an element of a crime in chs. 939 to 951, such intent is indicated by the term "intentionally", the phrase "with intent to", the phrase "with intent that", or some form of the verbs "know" or "believe".

(2) "Know" requires only that the actor believes that the specified fact exists.

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally".

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section.

(6) Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.

History: 1979 c. 89; 1987 a. 332 s. 64; 1987 a. 399; 1993 a. 486.

Judicial Council Note, 1988: Subs. (3) and (4) are conformed to the formulation of s. 2.02 (2) (b) ii of the model penal code. [Bill 191−S]

A person need not foresee or intend the specific consequences of an act in order to possess the requisite criminal intent and is presumed to intend the natural and probable consequences of the act. State v. Gould, 56 Wis. 2d 808, 202 N.W.2d 903 (1973).

Instructions on intent to kill created a permissible rebuttable presumption that shifted the burden of production to the defendant, but not the burden of persuasion. Muller v. State, 94 Wis. 2d 450, 289 N.W.2d 570 (1980).

The court properly refused to instruct the jury on a "mistake of fact" defense when the accused claimed that the victim moved into the path of a gunshot intended only to frighten the victim. State v. Bougneit, 97 Wis. 2d 687, 294 N.W.2d 675 (Ct. App. 1980).

The constitutionality of sub. (3) is upheld. State v. Smith, 170 Wis. 2d 701, 490 N.W.2d 40 (Ct. App. 1992).

The trial court's wholesale exclusion of the defendant's proffered expert and lay testimony regarding posttraumatic stress disorder from the guilt phase of a murder trial without valid justification violated the defendant's right to present a defense and to testify on her own behalf. Morgan v. Krenke, 72 F. Supp. 2d 980 (1999).

939.24 Criminal recklessness. (1) In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk, except that for purposes of ss. 940.02 (1m), 940.06 (2) and 940.23 (1) (b) and (2) (b), "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to an unborn child, to the woman who is pregnant with that unborn child or to another and the actor is aware of that risk.

(2) Except as provided in ss. 940.285, 940.29, 940.295, and 943.76, if criminal recklessness is an element of a crime in chs. 939 to 951, the recklessness is indicated by the term "reckless" or "recklessly".

History: 1987 a. 399; 1989 a. 56 s. 259; 1993 a. 445; 1997 a. 295; 2001 a. 109; 2013 a. 307.

Judicial Council Note, 1988: This section is new. It provides a uniform definition of criminal recklessness, the culpable mental state of numerous offenses. Recklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk.

Sub. (3) continues the present rule that a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness. Ameen v. State, 51 Wis. 2d 175, 185 (1971). Patterned on s. 2.08 of the model penal code, it premises liability on whether the actor would have been aware if not in such condition of the risk of death or great bodily harm. The commentaries to s. 2.08, model penal code, state the rationale of this rule in extended fashion. [Bill 191−S]

939.25 Criminal negligence. (1) In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another, except that for purposes of ss. 940.08 (2), 940.10 (2) and 940.24 (2), "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to an unborn child, to the woman who is pregnant with that unborn child or to another.

(2) If criminal negligence is an element of a crime in chs. 939 to 951 or s. 346.62, the negligence is indicated by the term "negligent" or "negligently".

History: 1987 a. 399; 1989 a. 56 s. 259; 1997 a. 180, 295.

Judicial Council Note, 1988: This section is new. It provides a uniform definition of criminal negligence, patterned on prior ss. 940.08 (2), 940.24 (2) and 941.01 (2). Criminal negligence means the creation of a substantial and unreasonable risk of death or great bodily harm to another, of which the actor should be aware. [Bill 191−S]

The definition of criminal negligence as applied to homicide by negligent operation of a vehicle is not unconstitutionally vague. State v. Barman, 183 Wis. 2d 180, 515 N.W.2d 493 (Ct. App. 1994).

SUBCHAPTER II

INCHOATE CRIMES

939.30 Solicitation. (1) Except as provided in sub. (2) and s. 961.455, whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class H felony.

(2) For a solicitation to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class F felony. For a solicitation to commit a Class I felony, the actor is guilty of a Class I felony.

History: 1977 c. 173; 1989 a. 121; 1991 a. 153; 1995 a. 448; 2001 a. 109.

Prosecuting for solicitation under s. 939.30, rather than under s. 944.30 for prostitution, did not deny equal protection. Sears v. State, 94 Wis. 2d 128, 287 N.W.2d 785 (1980).

Section 939.05 (2) (c) does not make renunciation or withdrawal a defense to the crime of solicitation. State v. Boehm, 127 Wis. 2d 351, 379 N.W.2d 874 (Ct. App. 1985).

When "A" solicits "B" to solicit "A" to commit perjury, "A" is guilty of solicitation. State v. Manthey, 169 Wis. 2d 673, 487 N.W.2d 44 (Ct. App. 1992).

939.31 Conspiracy. Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

History: 1977 c. 173; 1981 c. 118; 1985 a. 328; 1995 a. 448.

A conspiracy may be unilateral; a person can enter into a conspiracy to accomplish a criminal objective in which only the defendant has a criminal intent. State v. Sample, 215 Wis. 2d 487, 573 N.W.2d 187 (1998), 96−2184.

When the object of a conspiracy is the commission of multiple crimes, separate charges and convictions for each intended crime are permissible. State v. Jackson, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688, 03−2066.

There is a distinction between conspiracy as a substantive inchoate crime under s. 939.31 and conspiracy as a theory of prosecution for a substantive crime under s. 939.05 (2) (c). State v. Jackson, 2005 WI App 104, 281 Wis. 2d 137; 701 N.W.2d 42, 04−1603.

The agreement to commit a crime that is necessary for a conspiracy may be demonstrated by circumstantial evidence and need not be express; a tacit understanding of a shared goal is sufficient. The intent to commit the crime may be inferred from the person's conduct. A stake in the venture is not a necessary element of the crime although evidence of a stake in the venture may be persuasive of the degree of the party's involvement in the crime. State v. Routon, 2007 WI App 178, 304 Wis. 2d 480, 736 N.W.2d 530, 06−2557.

A person may be a member of a conspiracy — in particular, a conspiracy to manufacture a controlled substance — based on the person's sale of goods that are not illegal to sell or possess. One does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he or she knows of the conspiracy, the inference of which knowledge cannot be drawn from mere knowledge that the buyer will use the goods illegally. The gist of the conspiracy is the seller's intent, when given effect by an overt act to further, promote, and cooperate in the buyer's intended illegal use. There must be clear, unequivocal evidence of the seller's knowledge of the buyer's intended illegal use. State v. Routon, 2007 WI App 178, 304 Wis. 2d 480, 736 N.W.2d 530, 06−2557.

Under a unilateral conspiracy, a person who intends to accomplish the objects of the conspiracy is guilty even though the other members of the conspiracy never intended that a crime be committed. This same logic applies to the next step: that is, when the fulfillment of the conspiracy is not only highly unlikely, but is legally impossible. State v. Huff, 2009 WI App 92, 319 Wis. 2d 258, 769 N.W.2d 154, 08−2664.

For an act to performed by one of the conspirators in furtherance of the conspiracy, an overt act must be done toward the commission of the intended crime that must go beyond mere planning and agreement. However, the act need not, by itself, be an unlawful act or an attempt to commit the crime. If there was an act that was a step toward accomplishing the criminal objective, that is sufficient. In this case, the defendant's act of communicating to a detective that cocaine was available for immediate delivery was such an overt act. State v. Peralta, 2011 WI App 81, 334 Wis. 2d 159, 800 N.W.2d 512, 10−0563.

939.32 Attempt. (1) GENERALLY. Whoever attempts to commit a felony or a crime specified in s. 940.19, 940.195, 943.20, or 943.74 may be fined or imprisoned or both as provided under sub. (1g), except:

(a) Whoever attempts to commit a crime for which the penalty is life imprisonment is guilty of a Class B felony.

(bm) Whoever attempts to commit a Class I felony, other than one to which a penalty enhancement statute listed in s. 973.01 (2) (c) 2. a. or b. is being applied, is guilty of a Class A misdemeanor.

(c) Whoever attempts to commit a crime under ss. 940.42 to 940.45 is subject to the penalty for the completed act, as provided in s. 940.46.

(cm) Whoever attempts to commit a crime under s. 941.21 is subject to the penalty provided in that section for the completed act.

(cr) Whoever attempts to commit a crime under s. 948.055 (1) is subject to the penalty for the completed act, as provided in s. 948.055 (2).

(d) Whoever attempts to commit a crime under s. 948.07 is subject to the penalty provided in that section for the completed act.

(de) Whoever attempts to commit a crime under s. 948.075 (1r) is subject to the penalty provided in that subsection for the completed act.

(e) Whoever attempts to commit a crime under s. 948.605 (3) (a) is subject to the penalty provided in that paragraph for the completed act.

(f) Whoever attempts to commit a crime under s. 946.79 is subject to the penalty provided in that section for the completed act.

(g) Whoever attempts to commit a crime under s. 101.10 (3) (e) is subject to the penalty for the completed act, as provided in s. 101.10 (4) (b).

(1g) MAXIMUM PENALTY. The maximum penalty for an attempt to commit a crime that is punishable under sub. (1) (intro.) is as follows:

(a) The maximum fine is one−half of the maximum fine for the completed crime.

(b) 1. If neither s. 939.62 (1) nor s. 961.48 is being applied, the maximum term of imprisonment is one−half of the maximum term of imprisonment, as increased by any penalty enhancement statute listed in s. 973.01 (2) (c) 2. a. and b., for the completed crime.

2. If either s. 939.62 (1) or 961.48 is being applied, the maximum term of imprisonment is determined by the following method:

a. Multiplying by one−half the maximum term of imprisonment, as increased by any penalty enhancement statute listed in s. 973.01 (2) (c) 2. a. and b., for the completed crime.

b. Applying s. 939.62 (1) or 961.48 to the product obtained under subd. 2. a.

(1m) BIFURCATED SENTENCES. If the court imposes a bifurcated sentence under s. 973.01 (1) for an attempt to commit a crime that is punishable under sub. (1) (intro.), the following requirements apply:

(a) *Maximum term of confinement for attempt to commit classified felony.* 1. Subject to the minimum term of extended supervision required under s. 973.01 (2) (d), if the crime is a classified felony and neither s. 939.62 (1) nor s. 961.48 is being applied, the maximum term of confinement in prison is one−half of the maximum term of confinement in prison specified in s. 973.01 (2) (b), as increased by any penalty enhancement statute listed in s. 973.01 (2) (c) 2. a. and b., for the classified felony.

2. Subject to the minimum term of extended supervision required under s. 973.01 (2) (d), if the crime is a classified felony and either s. 939.62 (1) or 961.48 is being applied, the court shall determine the maximum term of confinement in prison by the following method:

a. Multiplying by one−half the maximum term of confinement in prison specified in s. 973.01 (2) (b), as increased by any penalty enhancement statutes listed in s. 973.01 (2) (c) 2. a. and b., for the classified felony.

b. Applying s. 939.62 (1) or 961.48 to the product obtained under subd. 2. a.

(b) *Maximum term of extended supervision for attempt to commit classified felony.* The maximum term of extended supervision for an attempt to commit a classified felony is one−half of the maximum term of extended supervision for the completed crime under s. 973.01 (2) (d).

(c) *Maximum term of confinement for attempt to commit unclassified felony or misdemeanor.* The court shall determine the maximum term of confinement in prison for an attempt to commit a crime other than a classified felony by applying s. 973.01 (2) (b) 10. to the maximum term of imprisonment calculated under sub. (1g) (b).

(2) MISDEMEANOR COMPUTER CRIMES. Whoever attempts to commit a misdemeanor under s. 943.70 is subject to:

(a) A Class D forfeiture if it is the person's first violation under s. 943.70.

(b) A Class C forfeiture if it is the person's 2nd violation under s. 943.70.

(c) A Class B forfeiture if it is the person's 3rd violation under s. 943.70.

(d) A Class A forfeiture if it is the person's 4th or subsequent violation under s. 943.70.

(2m) MISDEMEANOR CRIMES AGAINST FINANCIAL INSTITUTION. Whoever attempts to commit a crime under s. 943.81, 943.82 (1), 943.83, or 943.84 that is a Class A misdemeanor under s. 943.91 (1) is subject to the penalty for a Class B misdemeanor.

(3) REQUIREMENTS. An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

History: 1977 c. 173; 1981 c. 118; 1983 a. 438; 1987 a. 332; 1989 a. 336; 1991 a. 17; 1993 a. 98, 486; 1997 a. 295; 2001 a. 91, 109; 2003 a. 36, 321; 2005 a. 14, 212; 2009 a. 180; 2011 a. 284; 2013 a. 165 s. 115.

There is no crime of "attempted homicide by reckless conduct" since the completed offense does not require intent while any attempt must demonstrate intent. State v. Melvin, 49 Wis. 2d 246, 181 N.W.2d 490 (1970).

Attempted 1st−degree murder was shown when only the fact of the gun misfiring and the action of the intended victim prevented completion of the crime. Austin v. State, 52 Wis. 2d 716, 190 N.W.2d 887 (1971).

The victim's kicking of the defendant in the mouth and other resistance was a valid extraneous factor preventing the completion of a crime, an essential requirement for the crime of attempted rape. Adams v. State, 57 Wis. 2d 515, 204 N.W.2d 657 (1973).

The screams and struggles of an intended rape victim were an effective intervening extrinsic force not under the defendant's control. Leach v. State, 83 Wis. 2d 199, 265 N.W.2d 495 (1978).

The failure to consummate the crime is not an essential element of criminal attempt under sub. (2). Berry v. State, 90 Wis. 2d 316, 280 N.W.2d 204 (1979).

The intervention of an extraneous factor is not an essential element of criminal attempt. Hamiel v. State, 92 Wis. 2d 656, 285 N.W.2d 639 (1979).

To prove attempt, the state must prove intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable that the accused would have desisted of his or her own free will. State v. Stewart, 143 Wis. 2d 28, 420 N.W.2d 44 (1988).

Subs. (1) and (2) enumerate all offenses that may be prosecuted as attempts. State v. Cvorovic, 158 Wis. 2d 630, 462 N.W.2d 897 (Ct. App. 1990).

The meaning of "have an intent to" in sub. (3) should be defined and interpreted in relation to all criminal statutes. State v. Weeks, 165 Wis. 2d 200, 477 N.W.2d 642 (Ct. App. 1991).

When a sentence for an attempted crime is subject to repeater enhancement, the maximum penalty for the underlying crime is halved under sub. (1), then the enhancer is added to that penalty. State v. Bush, 185 Wis. 2d 716, 519 N.W.2d 645 (Ct. App. 1994).

The intervention of an extraneous factor that prevents the commission of a crime is irrelevant to an attempt to commit the crime unless the factor may negate the intent to commit the crime. That a defendant believed he was acquiring stolen property when the property was not actually stolen did not prevent the prosecution of the defendant for attempt to receive stolen property. State v. Kordas, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995).

Attempted felony murder, s. 940.03, does not exist. Attempt requires intent, and the crime of felony murder is complete without specific intent. State v. Briggs, 218 Wis. 2d 61, 579 N.W.2d 783 (Ct. App. 1998), 97−1558.

The conduct element of sub. (3) is satisfied when the accused engages in conduct that demonstrates that only a circumstance beyond the accused's control could prevent the crime; that it has become too late to repent and withdraw. State v. Henthorn, 218 Wis. 2d 526, 581 N.W.2d 544 (Ct. App. 1998), 97−2235.

Some crimes include attempt and cannot be combined with the general attempt statue. One cannot attempt to attempt to cause. State v. DeRango, 229 Wis. 2d 1, 599 N.W.2d 27 (Ct. App. 1999), 98−0642.

Neither *Melvin* nor *Briggs* purport to establish a general rule or address whether possession crimes may be charged as attempted crimes. There is no general rule that a crime may be charged as an attempt only when the crime has intent as an element. Unlike crimes with no state of mind element, the felon in possession of a firearm offense requires proof of knowledge. This makes the offense amenable, even under *Briggs*, to be charged as an attempted crime. State v. Henning, 2013 WI App 15, 346 Wis. 2d 246, 828 N.W.2d 235, 10−2449.

SUBCHAPTER III

DEFENSES TO CRIMINAL LIABILITY

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

(1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.

(2) Negatives the existence of a state of mind essential to the crime.

History: 1987 a. 399; 2013 a. 307.

To be relieved from responsibility for criminal acts, it is not enough for a defendant to establish that he or she was under the influence of intoxicating beverages; the defendant must establish that degree of intoxication that means he or she was utterly incapable of forming the intent requisite to the commission of the crime charged. State v. Guiden, 46 Wis. 2d 328, 174 N.W.2d 488 (1970).

This section does not afford a defense when drugs were taken voluntarily and the facts demonstrate that there was an intent to kill and conceal the crime. Gibson v. State, 55 Wis. 2d 110, 197 N.W.2d 813 (1972).

Evidence of addiction was properly excluded as a basis for showing "involuntariness." Loveday v. State, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

The intoxication instruction did not impermissibly shift the burden of proof to the accused. State v. Reynosa, 108 Wis. 2d 499, 322 N.W.2d 504 (Ct. App. 1982).

A correct statement of the law under this section should be conveyed to the jury by instructing it that it must consider the evidence regarding whether the defendant was intoxicated at the time of the alleged offense. State v. Foster, 191 Wis. 2d 14, 528 N.W.2d 22 (Ct. App. 1995).

It is not a requirement of the defense of involuntary intoxication when intoxication is caused by prescription drugs that the defendant did not know of the drug's intoxicating effect. Intoxication resulting from compliance with a physician's advice will not be deemed voluntary just because the defendant was aware of potential adverse side effects. State v. Gardner, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999), 98−2655.

To be entitled to an instruction on involuntary intoxication, the defendant must come forward with credible and sufficient evidence of intoxication to the extent that the defendant was unable to distinguish right from wrong. State v. Gardner, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999), 98−2655.

Alcoholism as a defense. 53 MLR 445.

939.43 Mistake. (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.

(2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.

The prosecution of an individual who relied on a governmental official's statutorily required legal opinion would impose an unconscionable rigidity in the law. State v. Davis, 63 Wis. 2d 75, 216 N.W.2d 31 (1974).

Mistake is not a defense to criminal negligence. A defendant's subjective state of mind is not relevant to determining criminal negligence. State v. Lindvig, 205 Wis. 2d 100, 555 N.W.2d 197 (Ct. App. 1996), 96−0235.

939.44 Adequate provocation. (1) In this section:

(a) "Adequate" means sufficient to cause complete lack of self−control in an ordinarily constituted person.

(b) "Provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self−control completely at the time of causing death.

(2) Adequate provocation is an affirmative defense only to first−degree intentional homicide and mitigates that offense to 2nd−degree intentional homicide.

History: 1987 a. 399.

Judicial Council Note, 1988: Sub. (1) codifies Wisconsin decisions defining "heat of passion" under prior s. 940.05. Ryan v. State, 115 Wis. 488 (1902); Johnson v. State, 129 Wis. 146 (1906); Carlone v. State, 150 Wis. 38 (1912); Zenou v. State, 4 Wis. 2d 655 (1958); State v. Bond, 41 Wis. 2d 219 (1969); State v. Williford, 103 Wis. 2d 98 (1981).

Traditionally, provocation had 2 essential requirements. State v. Williford, supra., at 113. The first reflected in sub. (1) (b), is subjective. The defendant must have acted in response to provocation. This necessitates an assessment of the particular defendant's state of mind at the time of the killing. The 2nd requirement, reflected in sub. (1) (a), is objective. Only provocation sufficient to cause a reasonable person to lose self−control completely is legally adequate to mitigate the severity of the offense.

Sub. (2) clarifies that adequate provocation is an affirmative defense to first−degree intentional homicide. Although adequate provocation does not negate the intent to kill such that the burden of persuasion rests on the state by constitutional principles (Mullaney v. Wilbur, 421 U.S. 684, (1975), Wisconsin has chosen to place the burden of disproving this defensive matter on the prosecution beyond a reasonable doubt. State v. Lee, 108 Wis. 2d 1 (1982). Since adequate provocation is not an affirmative defense to 2nd−degree intentional homicide, its effect is to mitigate the severity of an intentional homicide from first to 2nd degree. [Bill 191−S]

Adequate provocation includes both subjective and objective components. As to the subjective component, the defendant must actually believe the provocation occurred, and the lack of self−control must be caused by the provocation. As to the objective component, the provocation must be such that would cause an ordinary, reasonable person to lack self−control completely, and the defendant's belief that the provocative acts occurred must be reasonable. State v. Schmidt, 2012 WI App 113, 344 Wis. 2d 336, 824 N.W.2d 839, 11−1903.

To place provocation in issue, there need be only "some" evidence supporting the defense. The defendant's proffered evidence of provocation must be examined as a whole to determine whether the "some evidence" threshold is satisfied. It is an all−or−nothing determination as to whether the jury hears any evidence of the affirmative defense. The adequate provocation inquiry is fact−driven. If the victim's prior acts could contribute to a reasonable person's loss of self−control at the time of the crime, the acts are relevant to the objective component of the defense. State v. Schmidt, 2012 WI App 113, 344 Wis. 2d 336, 824 N.W.2d 839, 11−1903.

939.45 Privilege. The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

(1) When the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47; or

(2) When the actor's conduct is in defense of persons or property under any of the circumstances described in s. 939.48 or 939.49; or

(3) When the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office; or

(4) When the actor's conduct is a reasonable accomplishment of a lawful arrest; or

(5) (a) In this subsection:

1. "Child" has the meaning specified in s. 948.01 (1).

3. "Person responsible for the child's welfare" includes the child's parent, stepparent or guardian; an employee of a public or private residential home, institution or agency in which the child resides or is confined or that provides services to the child; or any other person legally responsible for the child's welfare in a residential setting.

(b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

(6) When for any other reason the actor's conduct is privileged by the statutory or common law of this state.

History: 1979 c. 110 s. 60 (1); 1987 a. 332; 1989 a. 31; 1995 a. 214.

The privilege under sub. (3) for public officials acting with apparent authority did not apply to a volunteer fire fighter driving while under the influence of an intoxicant. State v. Schoenheide, 104 Wis. 2d 114, 310 N.W.2d 650 (Ct. App. 1981).

A foster parent is a "person legally responsible for the child's welfare" under sub. (5). State v. West, 183 Wis. 2d 46, 515 N.W.2d 484 (Ct. App. 1994).

A mother's live−in boyfriend did not have parental immunity under sub. (5). The boyfriend did not have legal responsibility for the mother's children, and the term "parent" will not be interpreted to include persons *in loco parentis*. State v. Dodd, 185 Wis. 2d 560, 518 N.W.2d 300 (Ct. App. 1994)

A convicted felon's possession of a firearm is privileged under sub. (6) in limited enumerated circumstances. State v. Coleman, 206 Wis. 2d 199, 556 N.W.2d 701 (1996), 95−0917.

The common law privilege to forcibly resist an unlawful arrest is abrogated. State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), 96−0914.

There is no statutory or common law privilege for the crime of carrying a concealed weapon under s. 941.23. State v. Dundon, 226 Wis. 2d 654, 594 N.W.2d 780 (1999), 97−1423.

Under the facts of the case, the privilege of self−defense was inapplicable to a charge of carrying a concealed weapon. State v. Nollie, 2002 WI 4, 249 Wis. 2d 538, 638 N.W.2d 280, 00−0744.

Sub. (6) incorporates excusable homicide by accident or misfortune. Accident is a defense that negatives intent. If a person kills another by accident, the killing could not have been intentional. Accident must be disproved beyond a reasonable doubt when a defendant raises it as a defense. When the state proves intent to kill beyond a reasonable doubt, it necessarily disproves accident. State v. Watkins, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00−0064.

A defendant may demonstrate that he or she was acting lawfully, a necessary element of an accident defense, by showing that he or she was acting in lawful self−defense. Although intentionally pointing a firearm at another constitutes a violation of s. 941.20, under s. 939.48 (1) a person is privileged to point a gun at another person in self−defense if the person reasonably believes that the threat of force is necessary to prevent or terminate what he or she reasonably believes to be an unlawful interference. State v. Watkins, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00−0064.

To overcome the privilege of parental discipline in sub. (5), the state must prove beyond a reasonable doubt that only one of the following is not met: 1) the use of force must be reasonably necessary; 2) the amount and nature of the force used must be reasonable; and 3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death. Whether a reasonable person would have believed the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. State v. Kimberly B. 2005 WI App 115, 283 Wis. 2d 731, 699 N.W.2d 641, 04−1424.

Testimony supporting the defendant father's assertion that he was beaten with a belt as a child was not relevant to whether the amount of force he used in spanking his daughter was objectively reasonable. A parent may not abuse his or her child and claim that conduct is reasonable based on his or her history of being similarly abused. State v. Williams, 2006 WI App 212, 296 Wis. 2d 834, 723 N.W.2d 719, 05−2282.

939.46 Coercion. (1) A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first−degree intentional homicide, the degree of the crime is reduced to 2nd−degree intentional homicide.

(1m) A victim of a violation of s. 940.302 (2) or 948.051 has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051.

(2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse.

History: 1975 c. 94; 1987 a. 399; 2007 a. 116.

Judicial Council Note, 1988: Sub. (1) is amended by conforming references to the statute titles created by this bill. Since coercion mitigates first−degree intentional homicide to 2nd degree, it is obviously not a defense to prosecution for the latter crime. [Bill 191−S]

The state must disprove an asserted coercion defense beyond a reasonable doubt. Moes v. State, 91 Wis. 2d 756, 284 N.W.2d 66 (1979).

The coercion defense is limited to the most severe form of inducement. It requires finding that the actor believed he or she was threatened with immediate death or great bodily harm with no possible escape other than the commission of a criminal act. A defendant seeking a coercion defense instruction must meet the initial burden of producing evidence to support giving an instruction. That the defendant reasonably believed that a companion would attempt to harm him or her if he if he or she did not comply with the companion's orders only suggests that the safest course was to comply with companion's orders, not that it was the only course. State v. Keeran, 2004 WI App 4, 268 Wis. 2d 761, 674 N.W.2d 570, 01−1892.

939.47 Necessity. Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first−degree intentional homicide, the degree of the crime is reduced to 2nd−degree intentional homicide.

History: 1987 a. 399.

Judicial Council Note, 1988: This section is amended by conforming references to the statute titles created by this bill. Since necessity mitigates first−degree intentional homicide to 2nd degree, it is obviously not a defense to prosecution for the latter crime. [Bill 191−S]

The defense of necessity was unavailable to a demonstrator who sought to stop a shipment of nuclear fuel on the grounds of safety. State v. Olsen, 99 Wis. 2d 572, 299 N.W.2d 632 (Ct. App. 1980).

Heroin addiction is not a "natural physical force" as used in this section. An addict, caught injecting heroin in jail, who was not provided methadone as had been promised, was not entitled to assert necessity against a charge of possession of heroin because his addiction ultimately resulted from his conscious decision to start using illegal drugs. State v. Anthuber, 201 Wis. 2d 512, 549 N.W.2d 477 (Ct. App. 1996), 95−1365.

939.48 Self−defense and defense of others. (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

(1m) (a) In this subsection:

1. "Dwelling" has the meaning given in s. 895.07 (1) (h).

2. "Place of business" means a business that the actor owns or operates.

(ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:

1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.

2. The person against whom the force was used was in the actor's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

(b) The presumption described in par. (ar) does not apply if any of the following applies:

1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375 (1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

(2) Provocation affects the privilege of self−defense as follows:

(a) A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self−defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self−defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his or her assailant.

(b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his or her assailant.

(c) A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his or her assailant is not entitled to claim the privilege of self−defense.

(3) The privilege of self−defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first−degree or 2nd−degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first−degree or 2nd−degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

(4) A person is privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self−defense and that the person's intervention is necessary for the protection of the 3rd person.

(5) A person is privileged to use force against another if the person reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death.

(6) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

History: 1987 a. 399; 1993 a. 486; 2005 a. 253; 2011 a. 94.

Judicial Council Note, 1988: Sub. (3) is amended by conforming references to the statute titles as affected by this bill. [Bill 191−S]

When a defendant testified that he did not intend to shoot or use force, he could not claim self−defense. Cleghorn v. State, 55 Wis. 2d 466, 198 N.W.2d 577 (1972).

Sub. (2) (b) is inapplicable to a defendant if the nature of the initial provocation is a gun−in−hand confrontation of an intended victim by a self−identified robber. Under these circumstances the intended victim is justified in the use of force in the exercise of the right of self−defense. Ruff v. State, 65 Wis. 2d 713, 223 N.W.2d 446 (1974).

Whether a defendant's belief was reasonable under subs. (1) and (4) depends, in part, upon the parties' personal characteristics and histories and whether events were continuous. State v. Jones, 147 Wis. 2d 806, 434 N.W.2d 380 (1989).

Evidence of prior specific instances of violence that were known to the accused may be presented to support a defense of self−defense. The evidence is not limited to the accused's own testimony, but the evidence may not be extended to the point that it is being offered to prove that the victim acted in conformity with his or her violent tendencies. State v. Daniels, 160 Wis. 2d 85, 465 N.W.2d 633 (1991).

Imperfect self−defense contains an initial threshold element requiring a reasonable belief that the defendant was terminating an unlawful interference with his or her person. State v. Camacho, 176 Wis. 2d 860, 501 N.W.2d 380 (1993).

The reasonableness of a person's belief under sub. (1) is judged from the position of a person of ordinary intelligence and prudence in the same situation as the defendant, not a person identical to the defendant placed in the same situation as the defendant. A defendant's psycho−social history showing past violence toward the defendant is generally not relevant to this objective standard, although it may be relevant, as in spousal abuse cases, where the actors are the homicide victim and defendant. State v. Hampton, 207 Wis. 2d 369, 558 N.W.2d 884 (Ct. App. 1996).

The right to resist unlawful arrest is not part of the statutory right to self−defense. It is a common law privilege that is abrogated. State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), 96−0914.

While there is no statutory duty to retreat, whether the opportunity to retreat was available goes to whether the defendant reasonably believed the force used was necessary to prevent an interference with his or her person. A jury instruction to that effect was proper. State v. Wenger, 225 Wis. 2d 495, 593 N.W.2d 467 (Ct. App. 1999), 98−1739.

When a defendant fails to establish a factual basis to raise self−defense, prior specific acts of violence by the victim have no probative value. The presentation of subjective testimony by an accused, going to a belief that taking steps in self−defense was necessary, is not sufficient for the admission of self−defense evidence. State v. Head, 2000 WI App 275, 240 Wis. 2d 162, 622 N.W.2d 9, 99−3071.

Although intentionally pointing a firearm at another constitutes a violation of s. 941.20, under sub. (1) a person is privileged to point a gun at another person in self−defense if the person reasonably believes that the threat of force is necessary to prevent or terminate what he or she reasonably believes to be an unlawful interference. State v. Watkins, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00−0064.

A defendant asserting perfect self−defense against a charge of 1st−degree murder must meet an objective threshold showing that he or she reasonably believed that he or she was preventing or terminating an unlawful interference with his or her person and that the force used was necessary to prevent imminent death or great bodily harm. A defendant asserting the defense of unnecessary defensive force s. 940.01 (2) (b) to a charge of 1st−degree murder is not required to satisfy the objective threshold showing. State v. Head, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413, 99−3071.

When a defendant successfully makes self−defense an issue, the jury must be instructed as to the state's burden of proof regarding the nature of the crime, even if the defense is a negative defense. Wisconsin JI−Criminal 801 informs the jury that it "should consider the evidence relating to self−defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self−defense, [his] conduct did not create an unreasonable risk to another." This instruction implies that the defendant must satisfy the jury that the defendant was acting in self−defense and removes the burden of proof from the state to show that the defendant was engaged in criminally reckless conduct. State v. Austin, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, 12−0011.

When the circuit court instructed the jury to "consider the evidence relating to ... defense of others, in deciding whether defendant's conduct created an unreasonable risk.... If the defendant was acting lawfully in defense of others, his conduct did not create an unreasonable risk to another," the instruction on the state's burden of proof on defendant's defense of others defense was wholly omitted and the instructions were erroneous. State v. Austin, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, 12−0011.

Sub. (1m) does not justify continued use of deadly force against an intruder when that intruder is no longer in the actor's dwelling. The applicable definition of the actor's dwelling, s. 895.07 (1) (h), requires that the part of the lot or site in question be "devoted to residential use." While s. 895.07 (1) (h) lists several parts of a residential lot that are part of a "dwelling," it does not include a parking lot. The common denominator of the listed parts of dwellings is that all are property over which the actor has exclusive control. An apartment building parking lot is not exclusive to one tenant or devoted to the residential use of any one tenant. State v. Chew, 2014 WI App 116, 358 Wis. 2d 368, 856 N.W.2d 541, 13−2592.

A person may employ deadly force against another, if the person reasonably believes that force is necessary to protect a 3rd−person or one's self from imminent death or great bodily harm, without incurring civil liability for injury to the other. Clark v. Ziedonis, 513 F. 2d 79 (1975).

Self−defense — prior acts of the victim. 1974 WLR 266.

State v. Camacho: The Judicial Creation of an Objective Element to Wisconsin's Law of Imperfect Self−defense Homicide. Leiser. 1995 WLR 742.

Home Safe Home: Wisconsin's Castle Doctrine and Trespasser Liability Laws. Hinkston. Wis. Law. July 2013.

939.49 Defense of property and protection against retail theft. (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

(2) A person is privileged to defend a 3rd person's property from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend his or her own property from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such as would give the 3rd person the privilege to defend his or her own property, that his or her intervention is necessary for the protection of the 3rd person's property, and that the 3rd person whose property the person is protecting is a member of his or her immediate family or household or a person whose property the person has a legal duty to protect, or is a merchant and the actor is the merchant's employee or agent. An official or adult employee or agent of a library is privileged to defend the property of the library in the manner specified in this subsection.

(3) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

History: 1979 c. 245; 1981 c. 270; 1993 a. 486.

Sub. (1) is a defense to criminal liability. It is irrelevant to the issue of whether the emergency doctrine can apply in a civil action to excuse a party's contributory negligence. Kelly v. Berg, 2015 WI App 69, 365 Wis. 2d 83, 870 N.W.2d 481, 14−1346.

Flight on the part of one suspected of a felony does not, of itself, warrant the use of deadly force by an arresting officer, and it is only in certain aggravated circumstances that a police officer may shoot a fleeing suspect. Clark v. Ziedonis, 368 F. Supp. 544 (1973).

SUBCHAPTER IV

PENALTIES

939.50 Classification of felonies. (1) Felonies in the statutes are classified as follows:

(a) Class A felony.

(b) Class B felony.

(c) Class C felony.

(d) Class D felony.

(e) Class E felony.

(f) Class F felony.

(g) Class G felony.

(h) Class H felony.

(i) Class I felony.

(2) A felony is a Class A, B, C, D, E, F, G, H, or I felony when it is so specified in the statutes.

(3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.

(b) For a Class B felony, imprisonment not to exceed 60 years.

(c) For a Class C felony, a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

(d) For a Class D felony, a fine not to exceed $100,000 or imprisonment not to exceed 25 years, or both.

(e) For a Class E felony, a fine not to exceed $50,000 or imprisonment not to exceed 15 years, or both.

(f) For a Class F felony, a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

(g) For a Class G felony, a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.

(h) For a Class H felony, a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

(i) For a Class I felony, a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

History: 1977 c. 173; 1981 c. 280; 1987 a. 332 s. 64; 1993 a. 194; 1995 a. 69; 1997 a. 283; 1999 a. 188; 2001 a. 109.

939.51 Classification of misdemeanors. (1) Misdemeanors in chs. 939 to 951 are classified as follows:

(a) Class A misdemeanor.

(b) Class B misdemeanor.

(c) Class C misdemeanor.

(2) A misdemeanor is a Class A, B or C misdemeanor when it is so specified in chs. 939 to 951.

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

(b) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

History: 1977 c. 173; 1987 a. 332 s. 64; 1997 a. 35.

939.52 Classification of forfeitures. (1) Except as provided in ss. 946.86 and 946.87, forfeitures in chs. 939 to 951 are classified as follows:

(a) Class A forfeiture.

(b) Class B forfeiture.

(c) Class C forfeiture.

(d) Class D forfeiture.

(e) Class E forfeiture.

(2) A forfeiture is a Class A, B, C, D or E forfeiture when it is so specified in chs. 939 to 951.

(3) Penalties for forfeitures are as follows:

(a) For a Class A forfeiture, a forfeiture not to exceed $10,000.

(b) For a Class B forfeiture, a forfeiture not to exceed $1,000.

(c) For a Class C forfeiture, a forfeiture not to exceed $500.

(d) For a Class D forfeiture, a forfeiture not to exceed $200.

(e) For a Class E forfeiture, a forfeiture not to exceed $25.

History: 1977 c. 173; 1981 c. 280; 1987 a. 171; 1987 a. 332 s. 64; 1989 a. 121.

939.60 Felony and misdemeanor defined. A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor.

History: 1977 c. 418 s. 924 (18) (e).

When a statutory offense does not specify a place of confinement, a sentence of one year may be to either the county jail or the state prisons. All crimes punishable by imprisonment in the state prisons are classified as felonies. State ex rel. McDonald v. Douglas County Circuit Ct. 100 Wis. 2d 569, 302 N.W.2d 462 (1981).

939.61 Penalty when none expressed. (1) If a person is convicted of an act or omission prohibited by statute and for which no penalty is expressed, the person shall be subject to a forfeiture not to exceed $200.

(2) If a person is convicted of a misdemeanor under state law for which no penalty is expressed, the person may be fined not more than $500 or imprisoned not more than 30 days or both.

(3) Common law penalties are abolished.

History: 1977 c. 173.

939.615 Lifetime supervision of serious sex offenders. (1) DEFINITIONS. In this section:

(a) "Department" means the department of corrections.

(b) "Serious sex offense" means any of the following:

1. A violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. 940.22 (2), 940.225 (1), (2), or (3), 948.02 (1) or (2), 948.025 (1), 948.05 (1) or (1m), 948.051, 948.055 (1), 948.06, 948.07, 948.075, 948.08, 948.085, 948.11 (2) (a), 948.12, or 948.13 or of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.

2. A violation, or the solicitation, conspiracy or attempt to commit a violation, under ch. 940, 942, 943, 944 or 948 other than a violation specified in subd. 1., if the court determines that one of the purposes for the conduct constituting the violation was for the actor's sexual arousal or gratification.

(2) WHEN LIFETIME SUPERVISION MAY BE ORDERED. (a) Except as provided in par. (b), if a person is convicted of a serious sex offense or found not guilty of a serious sex offense by reason of mental disease or defect, the court may, in addition to sentencing the person, placing the person on probation or, if applicable, committing the person under s. 971.17, place the person on lifetime supervision by the department if notice concerning lifetime supervision was given to the person under s. 973.125 and if the court determines that lifetime supervision of the person is necessary to protect the public.

(b) A court may not place a person on lifetime supervision under this section if the person was previously placed on lifetime supervision under this section for a prior conviction for a serious sex offense or a prior finding of not guilty of a serious sex offense by reason of mental disease or defect and that previous placement on lifetime supervision has not been terminated under sub. (6).

(c) If the prosecutor is seeking lifetime supervision for a person who is charged with committing a serious sex offense specified in sub. (1) (b) 2., the court shall direct that the trier of fact find a special verdict as to whether the conduct constituting the offense was for the actor's sexual arousal or gratification.

(3) WHEN LIFETIME SUPERVISION BEGINS. Subject to sub. (4), the period of lifetime supervision on which a person is placed under this section shall begin at whichever of the following times is applicable:

(a) If the person is placed on probation for the serious sex offense, upon his or her discharge from probation.

(b) If the person is sentenced to prison for the serious sex offense, upon his or her discharge from parole or extended supervision.

(c) If the person is sentenced to prison for the serious sex offense and is being released from prison because he or she has

reached the expiration date of his or her sentence, upon his or her release from prison.

(d) If the person has been committed to the department of health services under s. 971.17 for the serious sex offense, upon the termination of his or her commitment under s. 971.17 (5) or his or her discharge from the commitment under s. 971.17 (6), whichever is applicable.

(e) If par. (a), (b), (c) or (d) does not apply, upon the person being sentenced for the serious sex offense.

(4) ONLY ONE PERIOD OF LIFETIME SUPERVISION MAY BE IMPOSED. If a person is being sentenced for more than one conviction for a serious sex offense, the court may place the person on one period of lifetime supervision only. A period of lifetime supervision ordered for a person sentenced for more than one conviction begins at whichever of the times specified in sub. (3) is the latest.

(5) STATUS OF PERSON PLACED ON LIFETIME SUPERVISION; POWERS AND DUTIES OF DEPARTMENT. (a) A person placed on lifetime supervision under this section is subject to the control of the department under conditions set by the court and regulations established by the department that are necessary to protect the public and promote the rehabilitation of the person placed on lifetime supervision.

(am) The department may temporarily take a person on lifetime supervision into custody if the department has reasonable grounds to believe that the person has violated a condition or regulation of lifetime supervision. Custody under this paragraph may last only as long as is reasonably necessary to investigate whether the person violated a condition or regulation of lifetime supervision and, if warranted, to refer the person to the appropriate prosecuting agency for commencement of prosecution under sub. (7).

(b) The department shall charge a fee to a person placed on lifetime supervision to partially reimburse the department for the costs of providing supervision and services. The department shall set varying rates for persons placed on lifetime supervision based on ability to pay and with the goal of receiving at least $1 per day, if appropriate, from each person placed on lifetime supervision. The department may decide not to charge a fee while a person placed on lifetime supervision is exempt as provided under par. (c). The department shall collect moneys for the fees charged under this paragraph and credit those moneys to the appropriation account under s. 20.410 (1) (gh).

(c) The department may decide not to charge a fee under par. (b) to any person placed on lifetime supervision while he or she meets any of the following conditions:

1. Is unemployed.

2. Is pursuing a full−time course of instruction approved by the department.

3. Is undergoing treatment approved by the department and is unable to work.

4. Has a statement from a physician certifying to the department that the person should be excused from working for medical reasons.

(6) PETITION FOR TERMINATION OF LIFETIME SUPERVISION. (a) Subject to par. (b), a person placed on lifetime supervision under this section may file a petition requesting that lifetime supervision be terminated. A person shall file a petition requesting termination of lifetime supervision with the court that ordered the lifetime supervision.

(b) 1. A person may not file a petition requesting termination of lifetime supervision if he or she has been convicted of a crime that was committed during the period of lifetime supervision.

2. A person may not file a petition requesting termination of lifetime supervision earlier than 15 years after the date on which the period of lifetime supervision began. If a person files a petition requesting termination of lifetime supervision at any time earlier than 15 years after the date on which the period of lifetime supervision began, the court shall deny the petition without a hearing.

(c) Upon receiving a petition requesting termination of lifetime supervision, the court shall send a copy of the petition to the district attorney responsible for prosecuting the serious sex offense that was the basis for the order of lifetime supervision. Upon receiving a copy of a petition sent to him or her under this paragraph, a district attorney shall conduct a criminal history record search to determine whether the person has been convicted of a criminal offense that was committed during the period of lifetime supervision. No later than 30 days after the date on which he or she receives the copy of the petition, the district attorney shall report the results of the criminal history record search to the court and may provide a written response to the petition.

(d) After reviewing the report of the district attorney submitted under par. (c) concerning the results of a criminal history record search, the court shall do whichever of the following is applicable:

1. If the report of the district attorney indicates that the person filing the petition has been convicted of a criminal offense that was committed during the period of lifetime supervision, the court shall deny the person's petition without a hearing.

2. If the report of the district attorney indicates that the person filing the petition has not been convicted of a criminal offense that was committed during the period of lifetime supervision, the court shall order the person to be examined under par. (e), shall notify the department that it may submit a report under par. (em) and shall schedule a hearing on the petition to be conducted as provided under par. (f).

(e) A person filing a petition requesting termination of lifetime supervision who is entitled to a hearing under par. (d) 2. shall be examined by a person who is either a physician or a psychologist licensed under ch. 455 and who is approved by the court. The physician or psychologist who conducts an examination under this paragraph shall prepare a report of his or her examination that includes his or her opinion of whether the person petitioning for termination of lifetime supervision is a danger to public. The physician or psychologist shall file the report of his or her examination with the court within 60 days after completing the examination, and the court shall provide copies of the report to the person filing the petition and the district attorney who received a copy of the person's petition under par. (c). The contents of the report shall be confidential until the physician or psychologist testifies at a hearing under par. (f). The person petitioning for termination of lifetime supervision shall pay the cost of an examination required under this paragraph.

(em) After it receives notification from the court under par. (d) 2., the department may prepare and submit to the court a report concerning a person who has filed a petition requesting termination of lifetime supervision. If the department prepares and submits a report under this paragraph, the report shall include information concerning the person's conduct while on lifetime supervision and an opinion as to whether lifetime supervision of the person is still necessary to protect the public. When a report prepared under this paragraph has been received by the court, the court shall, before the hearing under par. (f), disclose the contents of the report to the attorney for the person who filed the petition and to the district attorney. When the person who filed the petition is not represented by an attorney, the contents shall be disclosed to the person.

(f) A hearing on a petition requesting termination of lifetime supervision may not be conducted until the person filing the petition has been examined and a report of the examination has been filed as provided under par. (e). At the hearing, the court shall take evidence it considers relevant to determining whether lifetime supervision should be continued because the person who filed the petition is a danger to the public. The person who filed the petition and the district attorney who received the petition under par. (c)

may offer evidence relevant to the issue of the person's dangerousness and the continued need for lifetime supervision.

(g) The court may grant a petition requesting termination of lifetime supervision if it determines after a hearing under par. (f) that lifetime supervision is no longer necessary to protect the public.

(h) If a petition requesting termination of lifetime supervision is denied after a hearing under par. (f), the person may not file a subsequent petition requesting termination of lifetime supervision until at least 3 years have elapsed since the most recent petition was denied.

(i) If the court grants a petition requesting termination of lifetime supervision and the person is registered with the department under s. 301.45, the court may also order that the person is no longer required to comply with the reporting requirements under s. 301.45. This paragraph does not apply to a person who must continue to comply with the reporting requirements for life under s. 301.45 (5) (b) or for as long as he or she is in this state under s. 301.45 (5m) (b).

(7) PENALTY FOR VIOLATION OF A CONDITION OF LIFETIME SUPERVISION. (a) No person placed on lifetime supervision under this section may knowingly violate a condition or regulation of lifetime supervision established by the court or by the department.

(b) 1. Except as provided in subd. 2., whoever violates par. (a) is guilty of a Class A misdemeanor.

2. Whoever violates par. (a) is guilty of a Class I felony if the same conduct that violates par. (a) also constitutes a crime that is a felony.

History: 1997 a. 275; 1999 a. 3, 89; 2001 a. 109; 2005 a. 277; 2007 a. 20 s. 9121 (6) (a); 2007 a. 116; 2013 a. 362.

939.616 Mandatory minimum sentence for child sex offenses. (1g) If a person is convicted of a violation of s. 948.02 (1) (am) or 948.025 (1) (a), notwithstanding s. 973.014 (1g) (a) 1. and 2., the court may not make an extended supervision eligibility date determination on a date that will occur before the person has served a 25−year term of confinement in prison.

(1r) If a person is convicted of a violation of s. 948.02 (1) (b) or (c) or 948.025 (1) (b), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

(2) If a person is convicted of a violation of s. 948.02 (1) (d) or 948.025 (1) (c), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

(3) This section does not apply if s. 939.62 (2m) (c) applies. The mandatory minimum sentences in this section do not apply to an offender who was under 18 years of age when the violation occurred.

History: 2005 a. 430 s. 1; 2007 a. 80; 2007 a. 97 s. 309.

Labeling this section a "mandatory minimum sentence" statute and stating that "the court shall impose a bifurcated sentence" and that "[t]he term of confinement in prison portion of the bifurcated sentence shall be at least 25 years," the legislature has clearly prohibited probation. State v. Lalicata, 2012 WI App 138, 345 Wis. 2d 342, 824 N.W.2d 921, 12−0225.

939.617 Minimum sentence for certain child sex offenses. (1) Except as provided in subs. (2) and (3), if a person is convicted of a violation of s. 948.05, 948.075, or 948.12, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 5 years for violations of s. 948.05 or 948.075 and 3 years for violations of s. 948.12. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

(2) If the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record, the court may impose a sentence that is less than the sentence required under sub. (1) or may place the person on probation under any of the following circumstances:

(a) If the person is convicted of a violation of s. 948.05, the person is no more than 48 months older than the child who is the victim of the violation.

(b) If the person is convicted of a violation of s. 948.12, the person is no more than 48 months older than the child who engaged in the sexually explicit conduct.

(3) This section does not apply if the offender was under 18 years of age when the violation occurred.

History: 2005 a. 433; 2011 a.272; 2013 a. 165 s. 115.

The legislature had reasonable and practical grounds for making a conviction for using a computer to facilitate a child sex crime under s. 948.075 (1r) subject to a mandatory minimum sentence. Thus, there was a rational basis for the penalty enhancer in sub. (1) and sub. (1) was not unconstitutional as applied to the defendant. State v. Heidke, 2016 WI App 55, ___ Wis. 2d ___, 883 N.W.2d 162, 15−1420.

This section has a plain and unambiguous meaning. When faced with a conviction for possessing child pornography, sub. (1) requires the court to impose a bifurcated sentence with at least 3 years' initial confinement. Sub. (2) allows the court to depart from this minimum and impose less initial confinement or probation only if the defendant is not more than 48 months older than the child−victim. State v. Holcomb, 2016 WI App 70, ___ Wis. 2d ___, ___ N.W.2d ___, 15−0996.

939.618 Mandatory minimum sentence for repeat serious sex crimes. (1) In this section, "serious sex crime" means a violation of s. 940.225 (1) or (2).

(2) (a) Except as provided in par. (b), if a person has one or more prior convictions for a serious sex crime and subsequently commits a serious sex crime, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of a bifurcated sentence imposed under this subsection may not be less than 3 years and 6 months, but otherwise the penalties for the crime apply, subject to any applicable penalty enhancement. The court may not place the defendant on probation.

(b) If a person has one or more prior convictions for a violation of s. 940.225 (1) or for a comparable crime under federal law or the law of any state and subsequently is convicted of a violation of s. 940.225 (1), the maximum term of imprisonment for the violation of s. 940.225 (1) is life imprisonment without the possibility of parole or extended supervision.

History: 1993 a. 97, 227; 1997 a. 326; 2001 a. 109; 2005 a. 271; 2005 a. 433 s. 16; Stats. 2005 s. 939.618.

939.619 Mandatory minimum sentence for repeat serious violent crimes. (1) In this section, "serious violent crime" means a violation of s. 940.03 or 940.05.

(2) If a person has one or more prior convictions for a serious violent crime or a crime punishable by life imprisonment and subsequently commits a serious violent crime, the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of a bifurcated sentence imposed under this subsection may not be less than 3 years and 6 months, but otherwise the penalties for the crime apply, subject to any applicable penalty enhancement. The court may not place the defendant on probation.

History: 1993 a. 97; 2001 a. 109; 2005 a. 433 s. 17; Stats. 2005 s. 939.619.

939.62 Increased penalty for habitual criminality. (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed, except for an escape under s. 946.42 or a failure to report under s. 946.425, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of imprisonment of one year or less may be increased to not more than 2 years.

(b) A maximum term of imprisonment of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 4 years if the prior conviction was for a felony.

(c) A maximum term of imprisonment of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

(2) The actor is a repeater if the actor was convicted of a felony during the 5−year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5−year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

(2m) (a) In this subsection:

1m. "Serious child sex offense" means any of the following:

a. A violation of s. 948.02, 948.025, 948.05, 948.051, 948.055, 948.06, 948.07, 948.08, 948.085, 948.095 or 948.30 or, if the victim was a minor and the convicted person was not the victim's parent, a violation of s. 940.31.

b. A crime at any time under federal law or the law of any other state or, prior to July 16, 1998, under the law of this state that is comparable to a crime specified in subd. 1m. a.

2m. "Serious felony" means any of the following:

a. Any felony under s. 961.41 (1), (1m) or (1x) that is a Class A, B, or C felony or, if the felony was committed before February 1, 2003, that is or was punishable by a maximum prison term of 30 years or more.

am. A crime under s. 961.65.

b. Any felony under s. 940.09 (1), 1999 stats., s. 943.23 (1m) or (1r), 1999 stats., s. 948.35 (1) (b) or (c), 1999 stats., or s. 948.36, 1999 stats., or s. 940.01, 940.02, 940.03, 940.05, 940.09 (1c), 940.16, 940.19 (5), 940.195 (5), 940.21, 940.225 (1) or (2), 940.305, 940.31, 941.327 (2) (b) 4., 943.02, 943.10 (2), 943.23 (1g), 943.32 (2), 946.43 (1m), 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c) or (5) (a) 1., 2., 3., or 4., 948.05, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.30 (2).

c. The solicitation, conspiracy or attempt, under s. 939.30, 939.31 or 939.32, to commit a Class A felony.

d. A crime at any time under federal law or the law of any other state or, prior to April 28, 1994, under the law of this state that is comparable to a crime specified in subd. 2m. a., am., b., or c.

(b) The actor is a persistent repeater if one of the following applies:

1. The actor has been convicted of a serious felony on 2 or more separate occasions at any time preceding the serious felony for which he or she presently is being sentenced under ch. 973, which convictions remain of record and unreversed and, of the 2 or more previous convictions, at least one conviction occurred before the date of violation of at least one of the other felonies for which the actor was previously convicted.

2. The actor has been convicted of a serious child sex offense on at least one occasion at any time preceding the date of violation of the serious child sex offense for which he or she presently is being sentenced under ch. 973, which conviction remains of record and unreversed.

(bm) For purposes of counting a conviction under par. (b), it is immaterial that the sentence for the previous conviction was stayed, withheld or suspended, or that the actor was pardoned, unless the pardon was granted on the ground of innocence.

(c) If the actor is a persistent repeater, the term of imprisonment for the felony for which the persistent repeater presently is being sentenced under ch. 973 is life imprisonment without the possibility of parole or extended supervision.

(d) If a prior conviction is being considered as being covered under par. (a) 1m. b. or 2m. d. as comparable to a felony specified under par. (a) 1m. a. or 2m. a., am., b., or c., the conviction may be counted as a prior conviction under par. (b) only if the court determines, beyond a reasonable doubt, that the violation relating to that conviction would constitute a felony specified under par. (a) 1m. a. or 2m. a., am., b., or c. if committed by an adult in this state.

(3) In this section "felony" and "misdemeanor" have the following meanings:

(a) In case of crimes committed in this state, the terms do not include motor vehicle offenses under chs. 341 to 349 and offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938, but otherwise have the meanings designated in s. 939.60.

(b) In case of crimes committed in other jurisdictions, the terms do not include those crimes which are equivalent to motor vehicle offenses under chs. 341 to 349 or to offenses handled through proceedings in the court assigned to exercise jurisdiction under chs. 48 and 938. Otherwise, felony means a crime which under the laws of that jurisdiction carries a prescribed maximum penalty of imprisonment in a prison or penitentiary for one year or more. Misdemeanor means a crime which does not carry a prescribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.

History: 1977 c. 449; 1989 a. 85; 1993 a. 289, 483, 486; 1995 a. 77, 448; 1997 a. 219, 283, 295, 326; 1999 a. 32, 85, 188; 2001 a. 109; 2005 a. 14, 277; 2007 a. 116; 2013 a. 173 s. 33; 2015 a. 197 s. 51; 2015 a. 366.

Cross−reference: For procedure, see s. 973.12.

Imposition of a 3−year sentence as a repeater was not cruel and unusual even though the conviction involved the stealing of 2 boxes of candy, which carried a maximum sentence of 6 months. Hanson v. State, 48 Wis. 2d 203, 179 N.W.2d 909 (1970).

A repeater charge must be withheld from the jury's knowledge since it is relevant only to sentencing. Mulkovich v. State, 73 Wis. 2d 464, 243 N.W.2d 198 (1976).

This section authorizes penalty enhancement only when the maximum underlying sentence is imposed. The enhancement portion of a sub−maximum sentence is vacated as an abuse of sentencing discretion. State v. Harris, 119 Wis. 2d 612, 350 N.W.2d 633 (1984).

In sub. (2), "convicted of a misdemeanor on 3 separate occasions" requires 3 separate misdemeanors, not 3 separate court appearances. State v. Wittrock, 119 Wis. 2d 664, 350 N.W.2d 647 (1984).

A court's acceptance of a guilty plea or verdict is sufficient to trigger the operation of this section; completion of sentencing is not a prerequisite. State v. Wimmer, 152 Wis. 2d 654, 449 N.W.2d 621 (Ct. App. 1989).

Felony convictions entered following a waiver from juvenile court are a proper basis for a repeater allegation. State v. Kastner, 156 Wis. 2d 371, 457 N.W.2d 331 (Ct. App. 1990).

Sub. (1) is applicable when concurrent maximum sentences are imposed for multiple offenses. Consecutive sentences are not required. State v. Davis, 165 Wis. 2d 78, 477 N.W.2d 307 (Ct. App. 1991).

For offenses under ch. 161 [now ch. 961], the court may apply s. 961.48 or 939.62, but not both. State v. Ray, 166 Wis. 2d 855, 481 N.W.2d 288 (Ct. App. 1992).

Each conviction for a misdemeanor constitutes a "separate occasion" for purposes of sub. (2). State v. Hopkins, 168 Wis. 2d 802, 484 N.W.2d 549 (1992).

Enhancement of a sentence under this section does not violate double jeopardy. State v. James, 169 Wis. 2d 490, 485 N.W.2d 436 (Ct. App. 1992).

This section does not grant a trial court authority to increase a punitive sanction for contempt of court. State v. Carpenter, 179 Wis. 2d 838, 508 N.W.2d 69 (Ct. App. 1993).

The state is charged with proving a prior conviction and that it lies within the 5−year window of sub. (2). State v. Goldstein, 182 Wis. 2d 251, 513 N.W.2d 631 (Ct. App. 1994).

A guilty plea without a specific admission to repeater allegations is not sufficient to establish the facts necessary to impose the repeater penalty enhancer. State v. Zimmermann, 185 Wis. 2d 549, 518 N.W.2d 303 (Ct. App. 1994).

When a defendant does not admit to habitual criminality, the state must prove the alleged repeater status beyond a reasonable doubt. State v. Theriault, 187 Wis. 2d 125, 522 N.W.2d 264 (Ct. App. 1994).

A commitment under the Sex Crimes Law, ch. 975, is not a sentence under sub. (2). State v. Kruzycki, 192 Wis. 2d 509, 531 N.W.2d 429 (Ct. App. 1995).

Sub. (2m) (b) is constitutional. It does not violate the guaranty against cruel and unusual punishment, the principal of separation of powers, or the guaranty of equal protection. State v. Lindsey, 203 Wis. 2d 423, 554 N.W.2d 215 (Ct. App. 1996), 95−3392.

A conviction for purposes of sub. (2) occurs when the judgment of conviction under s. 972.13 is entered, not the date that guilt is found. Mikrut v. State, 212 Wis. 2d 859, 569 N.W.2d 765 (Ct. App. 1997), 96−2703.

Section 973.13 commands that all sentences in excess of that authorized by law be declared void, including the repeater portion of a sentence. Prior postconviction motions that failed to challenge the validity of the sentence do not bar seeking relief from faulty repeater sentences. State v. Flowers, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), 97−3682.

Sub. (2m) (b) does not violate constitutional equal protection requirements. State v. Block, 222 Wis. 2d 586, 587 N.W.2d 914 (Ct. App. 1998), 97−3265.

When the state charged the defendant as a repeater under subs. (1) (c) and (2), then charged the defendant as a repeater under sub. (2m) in the information, it abandoned the earlier charges and could not resurrect them when the latter charge proved to be invalid. State v. Thoms, 228 Wis. 2d 868, 599 N.W.2d 84 (Ct. App. 1999), 98−3260.

Confinement time spent on various parole holds qualifies as actual confinement serving a criminal sentence thereby extending the 5−year period under sub. (2). State v. Price, 231 Wis. 2d 229, 604 N.W.2d 898 (Ct. App. 1999), 99−0746.

Jail time served as a condition of probation is time spent in confinement under sub. (2) and is excluded from calculating the statute's time period. State v. Crider, 2000 WI App 84, 234 Wis. 2d 195, 610 N.W.2d 198, 99−1158.

A circuit court may not determine the validity of a prior conviction during an enhanced sentencing proceeding predicated on the prior conviction unless the offender alleges that a violation of the right to a lawyer occurred in the prior conviction. The offender may use whatever means are available to challenge the other conviction in another forum, and if successful, seek to reopen the enhanced sentence. State v. Hahn, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, 99−0554.

When two penalty enhancers are applicable to the same crime, the length of the second penalty enhancer is based on the maximum term for the base crime as extended by the first penalty enhancer. State v. Quiroz, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, 01−1549.

For purposes of applying this section, the definition of "crime" in s. 939.12 as "conduct which is prohibited by state law and punishable by fine or imprisonment or both" is applicable to statutes outside of chs. 939 to 948 and 951. State v. Sveum, 2002 WI App 105, 254 Wis. 2d 868, 648 N.W.2d 496, 01−0230.

An uncertified copy of a prior judgment of conviction may be used to prove a convicted defendant's status as a habitual criminal. The rules of evidence do not apply to documents offered during a circuit court's presentence determination of whether a qualifying prior conviction exists. The state has the burden of proof and must offer proof beyond a reasonable doubt of the conviction. State v. Saunders, 2002 WI 107, 255 Wis. 2d 589, 649 N.W.2d 263, 01−0271.

A defendant's admission that an out−of−state crime is a serious felony does not relieve a court of its obligation to make an independent determination on that issue. The trial court's failure to make that finding did not prevent the appellate court from making it. State v. Collins, 2002 WI App 177, 256 Wis. 2d 697, 649 N.W.2d 325, 01−2185.

Sub. (2m) is constitutional. State v. Radke, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66, 01−1879.

A defendant convicted of a second or subsequent OWI is subject to the penalty enhancements provided for in both ss. 346.65 (2) and 939.62, if the application of each enhancer is based on a separate and distinct prior conviction or convictions. State v. Delaney, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416, 01−1051.

In determining whether a prior offense was a serious child sex offense under sub. (2m), a court may apply an elements only test but may also conduct a comparable analysis by considering whether the defendant's conduct under the statute governing the prior conviction would constitute a felony under the current statute. State v. Wield, 2003 WI App 179, 266 Wis. 2d 872, 668 N.W.2d 823, 02−2242.

For purposes of computation of the 5−year period under sub. (2), time spent in the least restrictive phase of the intensive sanctions program is time spent in actual confinement serving a criminal sentence that is excluded. The intensive sanctions program operates as a correctional institution, is deemed a confinement classification, and is more restrictive than ordinary probation or parole supervision or extended supervision. State v. Pfeil, 2007 WI App 241, 306 Wis. 2d 237, 742 N.W.2d 573, 06−2771.

A trial court judge, rather than a jury, is allowed to determine the applicability of a defendant's prior conviction for sentence enhancement purposes when the necessary information concerning the prior conviction can be readily determined from an existing judicial record. State v. LaCount, 2008 WI 59, 310 Wis. 2d 85, 750 N.W.2d 780, 06−0672.

Evidence of repeater status may be submitted any time following the jury verdict up until the actual sentencing. State v. Kashney, 2008 WI App 164, 314 Wis. 2d 623, 761 N.W.2d 672, 07−2687.

The application of the persistent repeater statute requires a particular sequence of convictions: 1) the conviction date for the first offense must have preceded the violation date for the second offense, and 2) the conviction date for the second offense must have preceded the violation date for the current Wisconsin offense. State v. Long, 2009 WI 36, 317 Wis. 2d 92, 765 N.W.2d 557, 07−2307.

A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that he or she was denied the constitutional right to counsel in the earlier case. The U. S. Supreme Court recognized that the information a defendant must possess to execute a valid waiver of counsel depends on a range of case−specific factors, including the defendant's education or sophistication. The Supreme Court's reference to a defendant's "education or sophistication" suggests that a court may take the defendant's cognitive limitations into account when determining the validity of his or her waiver. State v. Bohlinger, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900, 12−1060.

Sub. (3) (a) has no bearing upon the last sentence of sub. (2), which does not use the word "felony" or "misdemeanor" at all, but is concerned only with "time" a defendant "spent in confinement" on a "criminal sentence," without any regard to the type of offense underlying that time. Nothing in these provision suggests that time a defendant spent in actual confinement on a criminal sentence under sub. (2) does not include time related to a motor vehicle offense conviction. State v. Cooper, 2016 WI App 63, ___ Wis. 2d ___, ___ N.W.2d ___, 15−1160.

939.621 Increased penalty for certain domestic abuse offenses. (1) In this section, "domestic abuse repeater" means either of the following:

(a) A person who commits, during the 72 hours immediately following an arrest for a domestic abuse incident as set forth in s. 968.075 (5), an act of domestic abuse, as defined in s. 968.075 (1) (a) that constitutes the commission of a crime. For the purpose of the definition under this paragraph, the 72−hour period applies whether or not there has been a waiver by the victim under s. 968.075 (5) (c).

(b) A person who was convicted, on 2 separate occasions, of a felony or a misdemeanor for which a court imposed a domestic abuse surcharge under s. 973.055 (1) or waived a domestic abuse surcharge pursuant to s. 973.055 (4), during the 10−year period immediately prior to the commission of the crime for which the person presently is being sentenced, if the convictions remain of record and unreversed. For the purpose of the definition under this paragraph, it is immaterial that sentence was stayed, withheld or suspended, or that the person was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 10−year period, time that the person spent in actual confinement serving a criminal sentence shall be excluded.

(2) If a person commits an act of domestic abuse, as defined in s. 968.075 (1) (a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the person is a domestic abuse repeater. The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction. The penalty increase under this section changes the status of a misdemeanor to a felony.

History: 1987 a. 346; 1995 a. 304; 2011 a. 277.

When two penalty enhancers are applicable to the same crime, the length of the second penalty enhancer is based on the maximum term for the base crime as extended by the first penalty enhancer. State v. Quiroz, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, 01−1549.

The proof requirements of s. 973.12 (1) apply to domestic abuse repeater allegations. For the domestic abuse repeater enhancer under sub. (1) (b) to apply, the state had to prove beyond a reasonable doubt, or the defendant had to personally admit, that the defendant was convicted on 2 separate occasions within the 10−year period immediately prior to the commission of the disorderly conduct of an offense for which a court either imposed a domestic abuse surcharge under s. 973.055 (1) or waived a domestic abuse surcharge under s. 973.055 (4). State v. Hill, 2016 WI App 29, 368 Wis. 2d 243, 878 N.W.2d 709, 15−0374.

Although Consolidated Court Automation Programs (CCAP) records do not constitute prima facie proof of prior convictions for purposes of s. 973.12 (1), nothing prevents the court from relying on those records to determine whether the defendant understood the domestic abuse repeater allegation in the charging documents and therefore admitted, by virtue of the defendant's no contest plea, that the defendant qualified as a domestic abuse repeater. State v. Hill, 2016 WI App 29, 368 Wis. 2d 243, 878 N.W.2d 709, 15−0374.

939.63 Penalties; use of a dangerous weapon. (1) If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) The maximum term of imprisonment for a misdemeanor may be increased by not more than 6 months.

(b) If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years.

(c) If the maximum term of imprisonment for a felony is more than 2 years, but not more than 5 years, the maximum term of imprisonment for the felony may be increased by not more than 4 years.

(d) The maximum term of imprisonment for a felony not specified in par. (b) or (c) may be increased by not more than 3 years.

(2) The increased penalty provided in this section does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged.

(3) This section applies only to crimes specified under chs. 939 to 951 and 961.

History: 1979 c. 114; 1981 c. 212; 1987 a. 332 s. 64; 1995 a. 448; 2001 a. 109.

The fact that the maximum term for a misdemeanor may exceed one year under sub. (1) (a) does not upgrade the crime to felony status. State v. Denter, 121 Wis. 2d 118, 357 N.W.2d 555 (1984).

Possession encompasses both actual and constructive possession. To prove a violation of this section, the state must prove that the defendant possessed the weapon to facilitate the predicate offense. State v. Peete, 185 Wis. 2d 255, 517 N.W.2d 149 (1994). See also State v. Howard, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), 95−0770.

An automobile may constitute a dangerous weapon under s. 939.22 (10). State v. Bidwell, 200 Wis. 2d 200, 546 N.W.2d 507 (Ct. App. 1996).

Under *Peete,* there is sufficient evidence of possession if the evidence allows a reasonable jury to find beyond a reasonable doubt that the defendant possessed a dangerous weapon in order to use it or threaten to use it, even if the defendant did not use or threaten to use it in the commission of the crime. State v. Page, 2000 WI App 267, 240 Wis. 2d 276, 622 N.W.2d 285, 99−2015.

When two penalty enhancers are applicable to the same crime, the length of the second penalty enhancer is based on the maximum term for the base crime as extended by the first penalty enhancer. State v. Quiroz, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, 01−1549.

939.632 Penalties; violent crime in a school zone. (1) In this section:

(a) "School" means a public school, parochial or private school, or tribal school, as defined in s. 115.001 (15m), that provides an educational program for one or more grades between grades 1 and 12 and that is commonly known as an elementary school, middle school, junior high school, senior high school, or high school.

(b) "School bus" has the meaning given in s. 340.01 (56).

(c) "School premises" means any school building, grounds, recreation area or athletic field or any other property owned, used or operated for school administration.

(d) "School zone" means any of the following:

1. On the premises of a school.

2. Within 1,000 feet from the premises of a school.

3. On a school bus or public transportation transporting students to and from a public or private school or to and from a tribal school, as defined in s. 115.001 (15m).

3m. At school bus stops where students are waiting for a school bus or are being dropped off by a school bus.

(e) "Violent crime" means any of the following:

1. Any felony under s. 940.01, 940.02, 940.03, 940.05, 940.09 (1c), 940.19 (2), (4) or (5), 940.21, 940.225 (1), (2) or (3), 940.235, 940.305, 940.31, 941.20, 941.21, 943.02, 943.06, 943.10 (2), 943.23 (1g), 943.32 (2), 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c) or (5) (a) 1., 2., 3., or 4., 948.05, 948.051, 948.055, 948.07, 948.08, 948.085, or 948.30 (2) or under s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.

2. The solicitation, conspiracy or attempt, under s. 939.30, 939.31 or 939.32, to commit a Class A felony.

3. Any misdemeanor under s. 940.19 (1), 940.225 (3m), 940.32 (2), 940.42, 940.44, 941.20 (1), 941.23, 941.231, 941.235, or 941.38 (3).

(2) If a person commits a violent crime in a school zone, the maximum term of imprisonment is increased as follows:

(a) If the violent crime is a felony, the maximum term of imprisonment is increased by 5 years.

(b) If the violent crime is a misdemeanor, the maximum term of imprisonment is increased by 3 months and the place of imprisonment is the county jail.

(3) (a) In addition to any other penalties that may apply to the crime under sub. (2), the court may require the person to complete 100 hours of community service work for a public agency or a nonprofit charitable organization. The court shall ensure that the defendant is provided a written statement of the terms of the community service order. Any organization or agency acting in good faith to which a defendant is assigned under an order under this paragraph has immunity from any civil liability in excess of $25,000 for acts or omissions by or impacting on the defendant.

(b) The court shall not impose the requirement under par. (a) if the court determines that the person would pose a threat to public safety while completing the requirement.

(4) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (2).

History: 1995 a. 22; 2001 a. 109; 2005 a. 277; 2007 a. 116, 127; 2009 a. 180, 302; 2015 a. 149, 366.

The violent crime in a school zone penalty enhancer is not unconstitutional as applied to the defendant. The legislature seeks to deter violent crime near schools in an effort to create a safety zone around schools. The 1,000−foot perimeter is a reasonable distance to try to accomplish this legislative goal. State v. Quintana, 2007 WI App 29, 299 Wis. 2d 234, 729 N.W.2d 776, 06−0499.

939.635 Increased penalty for certain crimes against children committed by a child care provider. If a person commits a violation of s. 948.02, 948.025, or 948.03 (2), (3), or (5) (a) 1., 2., 3., or 4. against a child for whom the person was providing child care for compensation, the maximum term of imprisonment for that crime may be increased by not more than 5 years.

History: 2011 a. 82; 2015 a. 366.

939.645 Penalty; crimes committed against certain people or property. (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum term of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum term of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

History: 1987 a. 348; 1991 a. 291; 2001 a. 109.

When two penalty enhancers are applicable to the same crime, the length of the second penalty enhancer is based on the maximum term for the base crime as extended by the first penalty enhancer. State v. Quiroz, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, 01−1549.

The "hate crimes" law, s. 939.645, does not unconstitutionally infringe upon free speech. State v. Mitchell, 508 U.S. 476, 124 L. Ed. 2d 436 (1993); 178 Wis. 2d 597, 504 N.W.2d 610 (1993).

Hate Crimes: New Limits on the Scope of the 1st Amendment. Resler. 77 MLR 415 (1993).

Put to the Proof: Evidentiary Considerations in Wisconsin Hate Crime Prosecutions. Read. 89 MLR 453 (2005).

Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Regulation of Hate Speech. Moran. 1994 WLR 1425.

Hate Crimes. Kassel. Wis. Law. Oct. 1992.

SUBCHAPTER V

RIGHTS OF THE PROSECUTION

939.65 Prosecution under more than one section permitted. Except as provided in s. 948.025 (3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.

History: 1993 a. 227.

Due process does not require that a person know with certainty which crime, among several, the person is committing, at least until the prosecution exercises its charging discretion. Harris v. State, 78 Wis. 2d 357, 254 N.W.2d 291 (1977).

939.66 Conviction of included crime permitted. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

(1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

(2) A crime which is a less serious type of criminal homicide under subch. I of ch. 940 than the one charged.

(2m) A crime which is a less serious or equally serious type of battery than the one charged.

(2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.

(2r) A crime which is a less serious type of violation under s. 943.23 than the one charged.

(3) A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent.

(4) An attempt in violation of s. 939.32 to commit the crime charged.

(4m) A crime of failure to timely pay child support under s. 948.22 (3) when the crime charged is failure to pay child support for more than 120 days under s. 948.22 (2).

(5) The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem or aggravated battery or an attempt to commit any of them.

(6) A crime specified in s. 940.285 (2) (b) 4. or 5. when the crime charged is specified in s. 940.19 (2) to (6), 940.225 (1), (2) or (3) or 940.30.

(6c) A crime that is a less serious type of violation under s. 940.285 than the one charged.

(6e) A crime that is a less serious type of violation under s. 940.295 than the one charged.

(7) The crime specified in s. 940.11 (2) when the crime charged is specified in s. 940.11 (1).

History: 1985 a. 29, 144, 306, 332; 1987 a. 332 s. 64; 1987 a. 349, 403; 1989 a. 31 s. 2909b; 1989 a. 250; 1991 a. 205; 1993 a. 441, 445, 491; 2005 a. 430; 2015 a. 81.

To submit a lesser included offense, there must be some reasonable ground in the evidence for conviction on the lesser and acquittal on the greater. A lesser offense is permissible when the evidence requires the jury to find a disputed factual element in the charged offense that is not required for the lesser and the jury might find the disputed fact either way. State v. Melvin, 49 Wis. 2d 246, 181 N.W.2d 490 (1970).

Attempted battery can only be an included crime as to the specific offenses listed. State v. Melvin, 49 Wis. 2d 246, 181 N.W.2d 490 (1970).

A charge of possession of a pistol by a minor is not an included crime in a charge of attempted first−degree murder because it includes the element of minority that the greater crime does not. State v. Melvin, 49 Wis. 2d 246, 181 N.W.2d 490 (1970).

Disorderly conduct is not a lesser included offense of criminal damage to property. State v. Chacon, 50 Wis. 2d 73, 183 N.W.2d 84 (1971).

While attempted aggravated battery is not an included crime of aggravated battery under sub. (1), it is under sub. (4). The reduced charge does not put the defendant in double jeopardy. Dunn v. State, 55 Wis. 2d 192, 197 N.W.2d 749 (1972).

Under sub. (1), the emphasis is on the proof, not the pleading, and the "stricken word test" stated in *Eastway v. State*, 189 Wis. 56, is not incorporated in the statute. Martin v. State, 57 Wis. 2d 499, 204 N.W.2d 499 (1973).

Section 947.015, bomb scares, is not an included crime in s. 941.30, recklessly endangering safety. State v. Van Ark, 62 Wis. 2d 155, 215 N.W.2d 41 (1974).

When the evidence overwhelmingly showed that a shooting was intentional, failure to include negligent homicide under ss. 940.06 and 940.08 as a lesser included offenses was not error. Hayzes v. State, 64 Wis. 2d 189, 218 N.W.2d 717 (1974).

In order to justify the submission of an instruction on a lesser degree of homicide than that with which the defendant is charged, there must be a reasonable basis in the evidence for acquittal on the greater charge and for conviction on the lesser charge. Harris v. State, 68 Wis. 2d 436, 228 N.W.2d 645 (1975).

For one crime to be included in another, it must be utterly impossible to commit the greater crime without committing the lesser. Randolph v. State, 83 Wis. 2d 630, 266 N.W.2d 334 (1978).

The test under sub. (1) concerns legal, statutorily defined elements of the crime, not peculiar facts of case. State v. Verhasselt, 83 Wis. 2d 647, 266 N.W.2d 342 (1978).

The trial court erred in denying the defendant's request for the submission of a verdict of endangering safety by conduct regardless of life as a lesser included offense of attempted murder. Hawthorne v. State, 99 Wis. 2d 673, 299 N.W.2d 866 (1981).

Without clear legislative intent to the contrary, multiple punishment may not be imposed for felony−murder and the underlying felony. State v. Gordon, 111 Wis. 2d 133, 330 N.W.2d 564 (1983).

When a defendant charged with 2nd−degree murder denied firing the fatal shot, a manslaughter instruction was properly denied. State v. Sarabia, 118 Wis. 2d 655, 348 N.W.2d 527 (1984).

Under the "elements only" test, offenses that require proof of nonconsent are not lesser included offenses of offenses for which proof of nonconsent is not required. State v. Richards, 123 Wis. 2d 1, 365 N.W.2d 7 (1985).

When police confiscated a large quantity of drugs from an empty home and the next day searched the defendant upon his return home, confiscating a small quantity of the same drugs, the defendant's conviction for a lesser−included offense of possession and a greater offense of possession with intent to deliver did not violate double jeopardy. State v. Stevens, 123 Wis. 2d 303, 367 N.W.2d 788 (1985).

Reckless use of weapons under s. 941.20 (1) (a), 1983 stats., was not a lesser included offense of crime of endangering safety by conduct regardless of life while armed under ss. 939.63 (1) (a) 3. and 941.30, 1983 stats. State v. Carrington, 134 Wis. 2d 260, 397 N.W.2d 484 (1986).

The court must instruct the jury on a properly requested lesser offense even though the statute of limitations bars the court from entering a conviction on the lesser offense. State v. Muentner, 138 Wis. 2d 374, 406 N.W.2d 415 (1987).

The court of appeals may not direct the circuit court to enter a judgment of conviction for a lesser included offense when a jury verdict of guilty on a greater offense is reversed for insufficiency of evidence and the jury was not instructed on the lesser included offense. State v. Myers, 158 Wis. 2d 356, 461 N.W.2d 777 (1990).

Convictions for both first−degree murder and burglary/battery are permissible. State v. Kuntz, 160 Wis. 2d 722, 467 N.W.2d 531 (1991).

Evidence at trial may suggest to the state that an instruction on a lesser included offense is appropriate; it is unreasonable for a defendant to assume at the outset of trial that evidence may not affect the state's prosecuting position. State v. Fleming, 181 Wis. 2d 546, 510 N.W.2d 837 (Ct. App. 1993).

This section does not bar multiple convictions when homicides are "equally serious." Two Class C felonies with the same maximum penalty were equally serious although one carried additional sanctions of driver license revocation and an additional penalty assessment that the other did not. State v. Lechner, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), 96−2830.

Misdemeanor battery is an included crime of felony battery, but they are not the same offense. Acquittal on felony battery charges does not prevent subsequent prosecution for misdemeanor battery. State v. Vassos, 218 Wis. 2d 330, 579 N.W.2d 35 (1998), 97−0938.

There is no rule that when a more specific crime could have been charged, the defendant loses the right to a lesser−included instruction on a more general offense. That retail theft, which was not a lesser−included offense of armed robbery, could have been charged did not prevent the giving of an instruction on theft as a lesser included offense of armed robbery. State v. Jones, 228 Wis. 2d 593, 598 N.W.2d 259 (Ct. App. 1999), 98−1681.

A lesser included offense must be both lesser and included. An offense with a heavier penalty cannot be regarded as a lesser offense than one with a lighter penalty. State v. Smits, 2001 WI App 45, 241 Wis. 2d 374, 626 N.W.2d 42, 00−1158.

When a jury returned a verdict finding the defendant guilty of both a greater and a lesser included offense, although it had been instructed that it could only find one or the other, it was not error for the court to enter judgment on the greater offense after polling the jury to confirm the result. State v. Hughes, 2001 WI App 239, 248 Wis. 2d 133, 635 N.W.2d 661, 00−3176. See also State v. Cox, 2007 WI App 38, 300 Wis. 2d 236, 730 N.W.2d 452, 06−0419.

Separate prosecutions for a carjacking that occurred on one day and operating the same car without the owner's consent on the next did not violate sub. (2r) or the constitutional protection against double jeopardy. State v. McKinnie, 2002 WI App 82, 252 Wis. 2d 172, 642 N.W.2d 617, 01−2764.

Sub. (2m) only applies to battery under s. 940.19 and not to battery by a prisoner under s. 940.20. Charging both was not multiplicitous and not a double jeopardy violation. State v. Davison, 2003 WI 89, 263 Wis. 2d 145, 666 N.W.2d 1, 01−0826.

Section 948.40 (1) and (4) (a), contributing to the delinquency of a child with death as a consequence, is not a "type of criminal homicide" included under sub. (2). It provides a more serious punishment when "death is a consequence" of its violation. In contrast, the homicide statutes in ch. 940 target those who "cause the death" of another. State v. Patterson, 2010 WI 130, 329 Wis. 2d 599, 790 N.W.2d 909, 08−1968.

Multiple Punishment in Wisconsin and the *Wolske* Decision: Is It Desirable to Permit Two Homicide Convictions for Causing a Single Death? 1990 WLR 553.

NOTE: See also notes to Art. I, sec. 8, Double Jeopardy.

SUBCHAPTER VI

RIGHTS OF THE ACCUSED

939.70 Presumption of innocence and burden of proof. No provision of chs. 939 to 951 shall be construed as changing the existing law with respect to presumption of innocence or burden of proof.

History: 1979 c. 89; 1987 a. 332 s. 64.

939.71 Limitation on the number of convictions. If an act forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.

Misdemeanor battery is an included crime of felony battery, but they are not the same offense. Acquittal on felony battery charges does not prevent subsequent prosecution for misdemeanor battery. State v. Vassos, 218 Wis. 2d 330, 579 N.W.2d 35 (1998), 97−0938.

This section does not bar a subsequent prosecution for an offense arising from the same acts that could not have been charged at the time of the first prosecution and thus did not bar prosecuting a defendant for 1st−degree intentional homicide for the same act which led to battery convictions when the victim died after having been in a coma for 4 years. State v. McKee, 2002 WI App 148, 256 Wis. 2d 547, 648 N.W.2d 34, 01−1966.

Under this section, a subsequent prosecution is not prohibited if each provision requires proof of a fact for conviction that the other does not require, even if the same conduct was involved in the two prosecutions. In contrast, s. 961.45 provides that if a violation of ch. 961 is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state. The difference in the 2 statutes does not violate equal protection. State v. Swinson, 2003 WI App 45, 261 Wis. 2d 633, 660 N.W.2d 12, 02−0395.

939.72 No conviction of both inchoate and completed crime. A person shall not be convicted under both:

(1) Section 939.30 for solicitation and s. 939.05 as a party to a crime which is the objective of the solicitation; or

(2) Section 939.31 for conspiracy and s. 939.05 as a party to a crime which is the objective of the conspiracy; or

(3) Section 939.32 for attempt and the section defining the completed crime.

History: 1991 a. 153; 2001 a. 109.

Sub. (3) does not bar convicting the defendant who shot at one person but killed another of both murder and attempted murder. Austin v. State, 86 Wis. 2d 213, 271 N.W.2d 668 (1978).

Sub. (3) does not bar convictions for possession of burglarious tools and burglary arising out of a single transaction. Dumas v. State, 90 Wis. 2d 518, 280 N.W.2d 310 (Ct. App. 1979).

This section refers to convictions, not charges. The state may properly charge a defendant with both being a party to an attempt to commit a crime and conspiracy to commit the crime. State v. Moffett, 2000 WI 130, 239 Wis. 2d 629, 619 N.W.2d 918, 99−1768.

939.73 Criminal penalty permitted only on conviction. A penalty for the commission of a crime may be imposed only after the actor has been duly convicted in a court of competent jurisdiction.

939.74 Time limitations on prosecutions. (1) Except as provided in subs. (2) and (2d) and s. 946.88 (1), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

(2) Notwithstanding that the time limitation under sub. (1) has expired:

(a) 1. A prosecution under s. 940.01, 940.02, 940.03, 940.05, 940.225 (1), 948.02 (1), or 948.025 (1) (a), (b), (c), or (d) may be commenced at any time.

2. A prosecution for an attempt to commit a violation of s. 940.01, 940.05, 940.225 (1), or 948.02 (1) may be commenced at any time.

(am) A prosecution under s. 940.06 may be commenced within 15 years after the commission of the violation.

(ar) A prosecution for a violation of s. 940.225 (2) or (3) may be commenced within 10 years after the commission of the violation.

(b) A prosecution for theft against one who obtained possession of the property lawfully and subsequently misappropriated it may be commenced within one year after discovery of the loss by the aggrieved party, but in no case shall this provision extend the time limitation in sub. (1) by more than 5 years.

(c) A prosecution for violation of s. 948.02 (2), 948.025 (1) (e), 948.03 (2) (a) or (5) (a) 1., 2., or 3., 948.05, 948.051, 948.06, 948.07 (1), (2), (3), or (4), 948.075, 948.08, 948.085, or 948.095 shall be commenced before the victim reaches the age of 45 years or be barred, except as provided in sub. (2d).

(cm) A prosecution for violation of s. 948.03 (2) (b) or (c), (3), (4), or (5) (a) 4. or 5., 948.04 or 948.07 (5) or (6) shall be commenced before the victim reaches the age of 26 years or be barred, except as provided in sub. (2d).

(2d) (a) In this subsection, "deoxyribonucleic acid profile" means an individual's patterned chemical structure of genetic information identified by analyzing biological material that contains the individual's deoxyribonucleic acid.

(am) For purposes of this subsection, crimes are related if they are committed against the same victim, are proximate in time, and are committed with the same intent, purpose, or opportunity so as to be part of the same course of conduct.

(c) If, before the applicable time limitation under sub. (1) or (2) (am), (ar), (c), or (cm) for commencing prosecution of a felony under ch. 940 or 948, other than a felony specified in sub. (2) (a), expires, the state collects biological material that is evidence of the identity of the person who committed the felony, identifies a deoxyribonucleic acid profile from the biological material, and compares the deoxyribonucleic acid profile to deoxyribonucleic acid profiles of known persons, the state may commence prosecution of the person who is the source of the biological material for the felony or a crime that is related to the felony or both within 12 months after comparison of the deoxyribonucleic acid profile relating to the felony results in a probable identification of the person or within the applicable time under sub. (1) or (2), whichever is latest.

(e) If, within 6 years after commission of a felony specified under sub. (2) (a), the state collects biological material that is evidence of the identity of the person who committed the felony, identifies a deoxyribonucleic acid profile from the biological material, and compares the deoxyribonucleic acid profile to deoxyribonucleic acid profiles of known persons, the state may commence prosecution of the person who is the source of the biological material for a crime that is related to the felony within 12 months after comparison of the deoxyribonucleic acid profile relating to the felony results in a probable identification of the person or within the applicable time under sub. (1) or (2), whichever is latest.

(3) In computing the time limited by this section, the time during which the actor was not publicly a resident within this state or during which a prosecution against the actor for the same act was pending shall not be included. A prosecution is pending when a warrant or a summons has been issued, an indictment has been found, or an information has been filed.

(4) In computing the time limited by this section, the time during which an alleged victim under s. 940.22 (2) is unable to seek the issuance of a complaint under s. 968.02 due to the effects of the sexual contact or due to any threats, instructions or statements from the therapist shall not be included.

History: 1981 c. 280; 1985 a. 275; 1987 a. 332, 380, 399, 403; 1989 a. 121; 1991 a. 269; 1993 a. 219, 227, 486; 1995 a. 456; 1997 a. 237; 2001 a. 16, 109; 2003 a. 196, 279, 326; 2005 a. 60, 276, 277; 2007 a. 80, 97, 116; 2009 a. 203; 2011 a. 271, 282; 2013 a. 165, 167; 2015 a. 121, 366.

While courts have no duty to secure informed waivers of possible statutory defenses when accepting a guilty plea, under the unique facts of the case, the defendant was entitled to withdraw a guilty plea to a charge barred by the statute of limitations. State v. Pohlhammer, 82 Wis. 2d 1, 260 N.W.2d 678 (1978).

Sub. (3) tolls the running of statutes of limitation during the period in which a defendant is not a state resident and violates neither the privileges and immunities clause nor the equal protection clause of the U.S. constitution. State v. Sher, 149 Wis. 2d 1, 437 N.W.2d 878 (1989).

A person is not "publicly a resident within this state" under sub. (3) when living outside the state but retaining state residence for voting and tax purposes. State v. Whitman, 160 Wis. 2d 260, 466 N.W.2d 193 (Ct. App. 1990).

An arrest warrant is issued for purposes of sub. (1) when it is signed by a judge with the intent that it be executed and leaves the possession of the judge. That the warrant is never executed is irrelevant. State v. Mueller, 201 Wis. 2d 121, 549 N.W.2d 455 (Ct. App. 1996), 93−3227.

The statute of limitations for a continuing offense does not run until the last act is done, which, viewed alone, is a crime. Otherwise, a prosecution for a felony offense must be commenced within 6 years. State v. Miller, 2002 WI App 197, 257 Wis. 2d. 124, 650 N.W.2d 850, 01−1406.

When the jury found the defendant guilty of having sexual contact with the minor victim during the period outside the statute of limitations, but also found that the victim was unable to seek the issuance of a complaint due to the effects of the sexual contact or due to statements or instructions by the defendant, the statute of limitations was tolled under sub. (4). The jury was required to agree upon a specific act committed within a specific time period but was not required to determine exactly when the agreed−upon offense was committed. When the date of the crime is not a material element of the offense charged, it need not be precisely alleged or determined. State v. Miller, 2002 WI App 197, 257 Wis. 2d. 124, 650 N.W.2d 850, 01−1406.

When a defendant is already in custody due to his or her incarceration, the filing of a criminal complaint is sufficient to commence a prosecution. State v. Jennings, 2003 WI 10, 259 Wis. 2d 523, 657 N.W.2d 393, 01−0507. See also State v. Elverman, 2015 WI App 91, 366_Wis. 2d 169, 873 N.W.2d 528, 14−0354.

The common law "year−and−a−day rule" that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01−3063.

When sub. (2) (c) was created in 1987, it only applied prospectively. Subsequent amendments did not change this conclusion because they did not change the initial applicability of sub. (2) (c). Rather, the language in the subsequent amendments, which stated these amendments apply to offenses not yet barred, was clearly meant to apply to offenses that sub. (2) (c) had not already barred. State v. MacArthur, 2008 WI 72, 310 Wis. 2d 550, 750 N.W.2d 910, 06−1379.

The circuit judge decides the tolling issue under sub. (3) in a pretrial proceeding wherein the state must prove that the defendant was not a public resident by a preponderance of the evidence. State v. MacArthur, 2008 WI 72, 310 Wis. 2d 550, 750 N.W.2d 910, 06−1379.

A plaintiff's allegations of the defendant district attorney's bad faith presented no impediment to application of the general principle prohibiting federal court interference with pending state prosecutions when the only factual assertion in support of the claim was the district attorney's delay in completing the prosecution, and there were no facts alleged that could support any conclusion other than that the district attorney had acted consistently with state statutes and constitution. Smith v. McCann, 381 F. Supp. 1027 (1974).

The 36−year tolling of the statute of limitations under sub. (3) was not unconstitutional in this case. It did not violate the Privileges and Immunities, Due Process, or Equal Protection provisions of the U.S. Constitution. Sub. (3) does not burden a fundamental right, and it is rationally related to the legitimate governmental interests of detecting crimes and apprehending criminals. State v. McGuire, 2010 WI 91, 328 Wis. 2d 289; 786 N.W.2d 227, 07−2711.

Sub. (2) (a) does not apply to a prosecution for attempted first−degree intentional homicide, which must instead be commenced within six years in accordance with sub. (1). State v. Larson, 2011 WI App 106, 336 Wis. 2d 419, 801 N.W.2d 343, 10−1666.

Sub. (2) (b) does not impose a requirement on the aggrieved party to exercise reasonable diligence in discovering the theft or loss. The one−year extension period in sub. (2) (b) begins to run only when the aggrieved party actually discovers the loss, not when it should have discovered the loss. State v. Simmelink, 2014 WI App 102, 357 Wis. 2d 430, 855 N.W.2d 437, 13−2491.

When an offense is a continuing offense, the statute of limitations does not begin to run until the last act is done that viewed by itself is a crime. Reading ss. 943.20 (1) (a) and 971.36 (3) (a) and (4) together, multiple acts of theft occurring over a period of time may, in certain circumstances, constitute one continuous offense that is not complete until the last act is completed. State v. Elverman, 2015 WI App 91, 366_Wis. 2d 169, 873 N.W.2d 528, 14−0354.

The Perils of Plain Language: Statute of Limitations for Child Sexual Assault Defendants. Flynn. Wis. Law. March 2009.

939.75 Death or harm to an unborn child. (1) In this section and ss. 939.24 (1), 939.25 (1), 940.01 (1) (b), 940.02 (1m), 940.05 (2g) and (2h), 940.06 (2), 940.08 (2), 940.09 (1) (c) to (e) and (1g) (c), (cm), and (d), 940.10 (2), 940.195, 940.23 (1) (b) and (2) (b), 940.24 (2) and 940.25 (1) (c) to (e), "unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.

(2) (a) In this subsection, "induced abortion" means the use of any instrument, medicine, drug or other substance or device in a medical procedure with the intent to terminate the pregnancy of a woman and with an intent other than to increase the probability of a live birth, to preserve the life or health of the infant after live birth or to remove a dead fetus.

(b) Sections 940.01 (1) (b), 940.02 (1m), 940.05 (2g) and (2h), 940.06 (2), 940.08 (2), 940.09 (1) (c) to (e) and (1g) (c), (cm), and (d), 940.10 (2), 940.195, 940.23 (1) (b) and (2) (b), 940.24 (2) and 940.25 (1) (c) to (e) do not apply to any of the following:

1. An act committed during an induced abortion. This subdivision does not limit the applicability of ss. 940.04, 940.13, 940.15 and 940.16 to an induced abortion.

2. An act that is committed in accordance with the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment performed by, or under the supervision of, a physician licensed under ch. 448.

2h. An act by any health care provider, as defined in s. 155.01 (7), that is in accordance with a pregnant woman's power of attorney for health care instrument under ch. 155 or in accordance with a decision of a health care agent who is acting under a pregnant woman's power of attorney for health care instrument under ch. 155.

3. An act by a woman who is pregnant with an unborn child that results in the death of or great bodily harm, substantial bodily harm or bodily harm to that unborn child.

4. The prescription, dispensation or administration by any person lawfully authorized to do so and the use by a woman of any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy.

(3) When the existence of an exception under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist in order to sustain a finding of guilt under s. 940.01 (1) (b), 940.02 (1m), 940.05 (2g), 940.06 (2), 940.08 (2), 940.09 (1) (c) to (e) or (1g) (c), (cm), or (d), 940.10 (2), 940.195, 940.23 (1) (b) or (2) (b), 940.24 (2) or 940.25 (1) (c) to (e).

History: 1997 a. 295; 2001 a. 109; 2003 a. 97.

Defendant's conviction under s. 940.09 (1) (c) for causing the death of an unborn child by intoxicated use of a motor vehicle was not unconstitutional. The court rejected the assertion that sub. (2) (b) 3. denies equal protection of the law because a pregnant woman can perform acts that cause the death of her unborn child without criminal liability while others are not similarly exempt for acts causing the death of the same unborn child. Because neither the defendant in this case nor anyone else is similarly situated to a pregnant woman who engages in conduct that causes the death of or harm to the unborn child within the pregnant woman, there is no equal protection violation. State v. Benson, 2012 WI App 101, 344 Wis. 2d 126, 822 N.W.2d 484, 11−1399.