CHAPTER 939
CRIMES — GENERAL PROVISIONS

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 bringing any of the stolen property into this state.

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 an 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.

939.04 Parties to crime. 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”.

939.05 Parties to crime. Parties to crime.

939.10 Common law crimes abolished; common law rules preserved.

939.11 Crime defined. A crime is defined as a public offense for which punishment may be imposed by the state.

939.12 Crime defined. Crime defined.

939.13 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.

939.25 Criminal negligence.

939.30 Solicitation.

939.31 Conspiracy.

939.33 Attempt.

939.42 Intoxication.

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.

939.50 Classification of felonies.

939.51 Classification of misdemeanors.

939.52 Classification of forfeitures.

939.60 Felony and misdemeanor defined. Felony and misdemeanor defined.

939.61 Penalty when none expressed. Penalty when none expressed.

939.65 Life imprisonment defined. Life imprisonment defined.

939.66 Mandatory minimum sentence for child sex offenses. Mandatory minimum sentence for child sex offenses.

939.67 Minimum sentence for certain child sex offenses. Minimum sentence for certain child sex offenses.

939.68 Mandatory minimum sentence for repeat serious sex crimes. Mandatory minimum sentence for repeat serious sex crimes.

939.69 Mandatory minimum sentence for repeat serious violent crimes. Mandatory minimum sentence for repeat serious violent crimes.

939.70 Increased penalty for habitual criminality. Increased penalty for habitual criminality.

939.71 Increased penalty for certain domestic abuse offenses. Increased penalty for certain domestic abuse offenses.

939.72 Increased penalty for elder person victims. Increased penalty for elder person victims.

939.73 Penalties; use of a dangerous weapon. Penalties; use of a dangerous weapon.

939.74 Penalties; violent crime in a school zone. Penalties; violent crime in a school zone.

939.75 Penalty for certain crimes against children committed by a child care provider. Penalty for certain crimes against children committed by a child care provider.

939.76 Increased penalty for certain crimes committed by a child care provider. Increased penalty for certain crimes committed by a child care provider.

939.77 Penalty; crimes committed against certain people or property. Penalty; crimes committed against certain people or property.

939.78 RIGHTS OF THE PROSECUTION

939.79 Rights of the prosecution.

939.80 Rights of the prosecution.

939.81 CONDUCT OF DEFENSE

939.82 Conduct of defense.

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943.201 Name and interpretation. Chapters 939 to 951 may be referred to as the criminal code but shall not be interpreted as bringing any of the stolen property into this state. Crimes committed prior to July 1, 1956, are not affected by chs. 939 to 951.

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

943.203 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 an 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 returns any of the stolen property into 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.


943.204 Subsection (1) (d) does not require that the child 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.

943.205 Subsection (1) (d) does not require that the child 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.

943.206 Subsection (1) (d) does not require that the child 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.

943.207 Subsection (1) (d) does not require that the child 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.

943.208 Subsection (1) (d) does not require that the child 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.

943.209 Subsection (1) (d) does not require that the child 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.

943.210 Subsection (1) (d) does not require that the child 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.

943.211 Subsection (1) (d) does not require that the child 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.

943.212 Subsection (1) (d) does not require that the child 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.

943.213 Subsection (1) (d) does not require that the child 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.

943.214 Subsection (1) (d) does not require that the child 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.

943.215 Subsection (1) (d) does not require that the child 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.
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 this section. State v. Minniecheske, 223 Wis. 2d 493, 590 N.W.2d 17 ( Ct. App. 1998), 98−1369.

For purposes of jurisdictional analysis, the defendant's father's concealment in Canada under an improper sentence. State v. Minniecheske, 203 Wis. 2d 522, 659 N.W.2d 110, 03−3478.

Age limits on criminal, juvenile delinquency, and juvenile in need of protection or services (JIPS) matters both define and restrict how a circuit court may address 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. Inglis, 2001 WI 31, 59, 592 N.W.2d 666 ( Ct. App. 1999), 99−0801.

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, 52 Wis. 2d 791, 191 N.W.2d 12 (1971).

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. Haagen, 52 Wis. 2d 683, 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 first−degree murder under this statute even though the defendant claimed only intending to rob and that an accomplice did the shooting. State v. Czydzik, 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 commission of that crime as a natural consequence. State v. Asfoor, 75 Wis. 2d 411, 219 N.W.2d 599 (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 others are doing; each defendant need not be present at the scene of the crime. Roehl v. State, 77 Wis. 2d 398, 235 N.W.2d 210 (1977).

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

Withdrawal from a conspiracy under sub. (2) (c) must be timely. Zelenka v. State, 81 Wis. 2d 691, 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).


A conspiracy commences with an agreement between two or more persons to direct their conduct toward the realization of a criminal objective, and each member of the conspiracy must individually intend the occurrence of the particular criminal venture. Each conspirator must have an individual stake in the conspiracy. 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 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 678 (1980).

A party to a crime is guilty of that crime whether or not that party intended the crime or 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 the crime does not have to be completed. State v. Hecht, 116 Wis. 2d 605, 342 N.W.2d 721 (1984).

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

Aiding and abetting a party to a 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 actual knowledge that the principals would be armed. State v. Ivy, 119 Wis. 2d 591, 350 N.W.2d 622 (1984).

Sub. (c) may be violated when the defendant solicits a second person to procure a third person to commit a crime. State v. Yee, 160 Wis. 2d 125, 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. 1990).

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. B.N.Z., 264 N.W.2d 391 (1973). See also State v. Chambers, 183 Wis. 2d 316, 515 N.W.2d 531 ( Ct. App. 1994); State v. Omen, 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 sub. (2) (c). State v. Jackson, 205 Wis. 2d 104, 281 Wis. 2d 137, 701 N.W.2d 42, 04−0603.

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).

The Instructions do not shift the burden of proof on the defendant’s mind and language in such a way as to require the parties concerned with the crime to perform any act which will not be committed if he or she withdraws within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

History: 1993 a. 486.

In the interest of justice, and because it is not possible to determine whether a person who directed another to commit a crime 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 intentionally changes his or her mind and language in such a way as to require the others concerned with the crime to perform any act which will not be committed if he or she withdraws 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 declared to be the public interest and in the public interest and in the public interest and in the public interest that 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 without showing of adverse effect on the defendant. Berihards 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 (1971).

Under sub. (2) (c), a conspirator is one who is concerned with a crime prior to its actual commission. State v. Haagen, 52 Wis. 2d 791, 191 N.W.2d 12 (1971).
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 any crime or any criminal act or acts that would be criminal if the actor were an adult, as defined in s. 21.02 (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 (1e) (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.

(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.

(I) 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.

(qm) Carjacking, as prohibited in s. 943.231.

(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) “Petchia” 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 performs 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, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person’s blood.

(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 petchia; 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. “Vehicle” does not include a personal delivery device, as defined in s. 340.01 (43g).

(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 weakness or defective mental capacity, or by reason of permanent or temporary.

History:

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, 74 Wis. 2d 327 (1976), 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. Schwend, 178 Wis. 2d 729, 500 N.W.2d 666 (Ct. App. 1992).

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. Sinks, 168 Wis. 2d 245, 483 N.W.2d 286 (Ct. App. 1992).

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. Sinks, 168 Wis. 2d 245, 483 N.W.2d 286 (Ct. App. 1992).

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.
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 conforms 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 have knowledge of natural and probable consequences of the act. State v. Gould, 56 Wis. 2d 802, 202 N.W.2d 933 (1971).

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, 259 Wis. 450, 209 N.W.2d 370 (1973).

The count 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. Bourgnet, 97 Wis. 2d 667, 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 withdrawal 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. Krenek, 52 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) and (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:

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 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). Passed Feb. 2, 1971. 2.08 of the model penal code, it premised 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]

939.30 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:

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


The crime of solicitation does not require that the actor know with certainty whether an injury will in fact result from the solicitor’s conduct. State v. Kiss, 2019 WI App 13, 386 Wis. 2d 314, 925 N.W.2d 563, 18–0651.

939.31 Conspiracy. Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1k), 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 con-
 insurgency 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.


A conspiracy by a unilateral person can enter into a conspiracy to accomplish a criminal objective in which only the defendant has a criminal intent. State v. Sam, 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, 2003 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 688, 03−2066.

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 trial before delivery was such an overt act. State v. Peralta, 2001 WI App 81, 334 Wis. 2d 159, 800 N.W.2d 512, 10−0663.

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.

(em) 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) 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) 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 second violation under s. 943.70.

(c) A Class B forfeiture if it is the person’s third violation under s. 943.70.

(d) A Class A forfeiture if it is the person’s fourth 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.  


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, 46 Wis. 2d 246, 181 N.W.2d 690 (1970).

Attempted first-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, 32 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. 515, 204 N.W. 67 (1884).

The screams and struggles of an intended rape victim were an effective intervening extrinsic force not under the defendant’s control.  Leach v. State, 338 Wis. 2d 61, 798 N.W.2d 672 (2013).  (Ct. App. 2012).

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. Broom, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999), rev’d 579 N.W.2d 783 (1998).

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).

A correct statement 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), rev’d 579 N.W.2d 783 (1998).


**939.43 Mistake.** (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negates 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. Lundvig, 205 Wis. 2d 100, 555 N.W.2d 197 (Ct. App. 1996), rev’d, 1997 Wis. App 113, 322 N.W.2d 504 (Ct. App. 1987).

**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, 29 Wis. 2d 146 (1926); Carpenter v. State, 31 Wis. 2d 121 (1963).  A “heat of passion” under prior s. 940.05.

**939.45 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) Negates the existence of a state of mind essential to the crime.

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

Neither relieved from responsibility for criminal acts, it is not enough for a defendant to demonstrate that the defendant was under the influence of intoxicating beverages; the defendant must establish that degree of intoxication that means the defendant was utterly unable to exercise the necessary force of the mind required 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 fact remained that there was an intent to kill and conceal the crime.  Gibson v. State, 35 Wis. 2d 110, 197 N.W.2d 813 (1972).

Evidence of addiction was properly excluded as a basis for showing “involuntariness.”  Loweday v. State, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).
939.45 CRIMES — GENERAL PROVISIONS

(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 appropriately 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).

2. “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 foregoing paragraphs are published 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. Schoenhende, 104 Wis. 2d 114, 310 N.W.2d 650 (Ct. App. 1981).

A parent is considered 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” is interpreted to include persons who are loco parents. 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.


There is no statutory or common law privilege for the crime of carrying a concealed weapon under s. 941.23. State v. Dandron, 226 Wis. 2d 654, 594 N.W.2d 780 (1999), 97–1425.

Under the facts of this case, the privilege of self-defense was inapplicable to a charge of carrying a concealed weapon. State v. Nollie, 2002 WI 14, 249 Wis. 2d 538, 639 N.W.2d 260, 609-0444.

Sub. (6) incorporates excusable homicide by accident or misfortune. Accident is a defense that negates 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, 00-0086.

A defendant may demonstrate that the defendant was acting lawfully, a necessary element of an accident defense, by showing that the defendant was acting in lawful self-defense. Although intentional pointing a firearm at another constitutes a violation of s. 941.2905, if the person prohibited from possessing a firearm was the respondent’s companion who causes the actor reasonably to believe that a companion would attempt to harm him or her if he or she did not comply with the companion’s orders only suggests that the safest course was to comply with the companion’s orders, not that it was the only course. State v. Keenan, 2004 WI App 31, 2004 Wis. App 212, 647 N.W.2d 244, 2004–2282.

The defense of necessity was unavailable to a demonstrator who sought to stop a demonstrator who sought to stop a predecessor’s orders. State v. Kizer, 2022 WI 58, 403 Wis. 2d 142, 764 N.W.2d 244, 09–2192.

The purpose of sub. (1m), an offense is “committed as a direct result” of a violation of the human–trafficking statutes if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation. “Committed as a direct result of the violation” does not require that the trafficking be aware of the offense or that it occur at the trafficker’s behest in furtherance of the trafficking violation. It simply requires that the offense occur as a direct result of the violation of the trafficking statutes. State v. Kizer, 2022 WI 58, 403 Wis. 2d 142, 764 N.W.2d 244, 09–2192.


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 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. Moore v. State, 91 Wis. 2d 756, 284 N.W.2d 66 (1979).

The coercion defense is limited to the most severe form of indictment. It requires finding that the actor believed the actor’s act was threatened with immediate death or great bodily harm to the actor or another with no possible escape other than the commission of a criminal act. A defendant seeking a coercion defense 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 or she did not comply with the companion’s orders only suggests that the safest course was to comply with the companion’s orders, not that it was the only course. State v. Keenan, 2004 WI App 31, 2004 Wis. App 212, 647 N.W.2d 244, 2004–2282.

For the purposes of sub. (1m), an offense is “committed as a direct result” of a violation of the human–trafficking statutes if there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation. “Committed as a direct result of the violation” does not require that the trafficking be aware of the offense or that it occur at the trafficker’s behest in furtherance of the trafficking violation. It simply requires that the offense occur as a direct result of the violation of the trafficking statutes. State v. Kizer, 2022 WI 58, 403 Wis. 2d 142, 764 N.W.2d 244, 09–2192.

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 not 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. 985.07 (1) (b).
2. “Place of business” means a business that the owner or operator 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 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 of 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 only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintentional 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 which 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 c. 239; 1993 a. 486 s. 293; 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 the defendant did not intend to shoot or use force, the defendant could not claim self-defense. Eleventh 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 predatory, head-on 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).

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 the defendant’s person. State v. Camacho, 176 Wis. 2d 860, 455 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. State v. Loc, 198 Wis. 2d 350, 577 N.W.2d 825 (1998), 96–0914.

When 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 the defendant’s person. A jury instruction to this effect was proper. State v. Wenger, 225 Wis. 2d 405, 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, 99–3077.

A defendant asserting perfect self-defense against a charge of first-degree murder must meet an objective threshold shown by a defendant reasonably believing that if the defendant was preventing or terminating an unlawful interference with the defendant’s person and that the force used was necessary to prevent imminent death of great bodily harm. State v. Watkins, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244, 00–0046.

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 Judicial Council Note: 801 informs the jury that it “should consider the evidence relating to self-defense in determining 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. Atkins, 2013 WI App 96, 349 Wis. 2d 833, 844 N.W.2d 236.

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. 985.07 (1) (h), requires that the part of the lot or site in question be “devoted to residential use.” While s. 985.07 (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, 15–2592.

Wisconsin law establishes a low bar that the accused must surmount to be entitled to a jury instruction on the defense of self-defense. The accused need produce “some evidence” in support of the privilege of self-defense. State v. Stietz, 2017 WI 58, 369 Wis. 2d 222, 880 N.W.2d 182, 14–2701. The jury instruction for self-defense in this case was not erroneous. The circuit court gave the jury a general instruction on the state’s burden to establish guilt beyond a reasonable doubt. Because self-defense is a negative defense, the state disproves self-defense beyond a reasonable doubt if the state proves the elements of the crime beyond a reasonable doubt, specifically criminal negligence. Therefore, the jury was aware that the state had to prove criminal negligence—the element that self-defense would negate—beyond a reasonable doubt. State v. Langlois, 2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812, 16–1409.

The privilege of perfect self-defense may exist in the factual context of a trespasser who kills a homeowner to thwart an attack by the homeowner. If a trespasser “reasonably believed” that a homeowner was “unlawfully interfering” with the trespasser’s person and that the homeowner’s purpose in attacking the trespasser was not because the homeowner viewed great bodily harm to himself but rather because he wanted to prevent the trespasser from reporting criminal activity, then the defendant’s use of force would be presumed to make the homeowner’s conduct lawful, would not preclude the trespasser from invoking perfect self-defense. State v. Johnson, 2020 WI App 50, 393 Wis. 2d 608, 949 N.W.2d 377, 18–2318. Affirmed on other grounds. 2021 WI 61, 397 Wis. 2d 633, 961 N.W.2d 18, 18–2318.

The law of self-defense, sub. (1), allows a defendant to threaten or intentionally use force against another if: 1) the defendant believes that there is an actual or imminent unlawful interference with the defendant’s person; 2) the defendant believes that the amount of force the defendant uses or threatens to use is necessary to prevent or terminate the interference; and 3) the defendant’s beliefs are reasonable. In this case, there was no reasonable view of the evidence that would have entitled the defendant to a self-defense instruction. State v. Ruffin, 2022 WI 34, 401 Wis. 2d 619, 974 N.W.2d 432, 19–1046.

A person may employ deadly force against another if the person reasonably believes that force is necessary to protect a third 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).


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.


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, justify 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.


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 30 days, or both.
(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 90 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.


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 (16) (c).

What 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. Circuit Court for Douglas County, 100 Wis. 2d 369, 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), 948.03 (1) or (1m), 948.051, 948.055 (1), 948.06, 948.07, 948.075, 948.08, 948.085, or 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 person’s 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.

(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.
or the court shall impose a bifurcated sentence under s. 948.02 (1c) (am)

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 not 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 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) shall be examined by a person who is either a physician or a psychologist 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.


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 the “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.


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, 370 Wis. 2d 771, 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 three 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 more than 48 months older than the child-victim. State v. Holcomb, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100, 15–0096.

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.

(b) The court may not place the defendant on probation.


939.619 Mandatory minimum sentence for repeat serious violent crimes. (1) In this section, “serious violent crime” means a violation of s. 940.02, 940.03, 940.05, 940.06, 940.09, 940.19 (5), 940.21, 940.305, 940.31, 941.327 (2) (b) 2., 3., or 4., 943.02, 943.231 (1), 943.32 (2), 943.87, 948.03 (2) (a) or (5), 948.051, or 948.30 (2).

(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 5 years, but otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.


939.6195 Mandatory minimum sentence for repeat firearm crimes. (1) In this section:

(a) “Firearm violation” means any of the following:

1. A violation of s. 941.29 or 941.2905.

2. A commission of any crime specified under chs. 939 to 951 and 961 if the person uses a firearm in the commission of the crime.

(b) “Repeater” has the meaning given in s. 939.62 (2).

(2) If a person who is a repeater is convicted of a firearm violation, the court shall impose a bifurcated sentence under s. 973.01. Notwithstanding s. 973.01 (2) (b), the term of confinement in prison portion of the bifurcated sentence shall be at least 4 years, but otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

History: 2017 a. 145.

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 parole or extended supervision.

This section does not apply to sentences imposed after July 1, 2022.

(3) The department of justice shall, after consulting with persons the department determines to be appropriate, including the city of Milwaukee and the Milwaukee police department, prepare a report on the efficacy of the mandatory minimum sentence under this section. No later than August 1, 2022, the department of justice shall submit the report to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2).

History: 2017 a. 145.

939.625 Increased penalty for repeat sexual abuse of children.

(1) If the defendant is a sexual predator, as that term is defined in s. 943.21 (1) (r), and the present conviction is for any child sex 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 sexual predator if the actor was convicted of a child sex crime 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 child sex crime on 3 separate occasions during that same period, which convictions remain of record and unreversed.

This section does not apply to sentences imposed after July 1, 2022.

(3) The department of justice shall, after consulting with persons the department determines to be appropriate, including the city of Milwaukee and the Milwaukee police department, prepare a report on the efficacy of the mandatory minimum sentence under this section. No later than August 1, 2022, the department of justice shall submit the report to the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2).

History: 2017 a. 145.
(5) (a) 1., 2., 3., or 4., 948.05, 948.06, 948.07, 948.075, 948.08, 948.081, 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 subds. 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 minor 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.


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

Implication of a three−year sentence as a repeater was not cruel and unusual even though the conviction involved the stealing of two boxes of candy, which carried a maximum sentence of six months. Hanson v. State, 48 Wis. 2d 205, 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 (1983).

tion, and is more restrictive than ordinary pretrial 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 to 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) an initial conviction 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, 2003 WI App 92, 675 N.W.2d 557, 1994−2367.

A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that the defendant 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 the defendant’s 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 provisions suggests that time a defendant spent in actual confinement on a criminal sentence under sub. (2) does not count towards a motor vehicle offense conviction. State v. Cooper, 2016 WI App 63, 371 Wis. 2d 539, 885 N.W.2d 390, 15−1160.

History: 1987 c. 346; 1995 a. 304; 2011 a. 277; 2017 a. 188.

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.

In this section, “elder person” means any individual who is 60 years of age or older.

If the crime victim is an elder person, and the present conviction is for any crime for which imprisonment may be imposed, 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 4 years.

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, during the 72 hours immediately following a domestic abuse incident, has been sentenced if the convictions remain of record and (2) the conviction date for the second offense must have preceded the violation date for the first offense; and (2) the conviction date for the second offense must have preceded the violation date for the current Wisconsin offense. State v. Long, 2003 WI App 92, 675 N.W.2d 557, 1994−2367.

(b) A person who, during the 10−year period immediately prior to the commission of the crime for which the person is presently being sentenced if the convictions remain of record and unrevoked, was convicted on 2 or more separate occasions of a felony or a misdemeanor for which a court waived a domestic abuse surcharge pursuant to s. 973.055 (4). State v. Hill, 2016 WI App 29, 368 Wis. 2d 243, 878 N.W.2d 709, 15−0374.

939.623 Increased penalty for elder person victims. (1) In this section, “elder person” means any individual who is 60 years of age or older.

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.

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.

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


The fact that the maximum term for a misdemeanor may exceed one year under sub. (1) (d) does not upgrade the crime to felony status. State v. Denton, 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 269, 564 N.W.2d 753 (1997), 95−0770.

An automobile may constitute a dangerous weapon under s. 939.22 (30). State v. Bidwell, 200 Wis. 2d 200, 546 N.W.2d 507 (Ct. App. 1996).

Under Peete, 185 Wis. 2d 4 (1994), 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. Quarz, 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 has only to prove that a conviction date, or the defendant had to personally admit, that the defendant was convicted on two separate occasions within the ten−year period immediately prior to the commission of the disorderly conduct offense for which the defendant possessed a dangerous weapon 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.

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. Quarz, 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 generally known as an elementary school.
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.

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), 940.198 (2) or (a) or (c), 940.21, 940.225 (1), (2) or (3), 940.235, 940.305, 940.31, 940.41, 940.42, 940.43, 940.45, 940.10 (2), 943.21 (1), 943.32 (2) or (1) or (2), 948.025, 948.03 (2) or (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, 940.21 (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. (1).

5 The violent crime in a school zone penalty enhancer is not unconstitutional as applied 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. Quroz, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 713, 01−1549.

6 “School crime” means any of the following:
   1. Within 1,000 feet from the premises of a school.
   2. On the premises of a school.
   3. At a recreation area or athletic field or any other property owned, used, or operated by a school that is ordinarily a school zone.

7 “Violent crime” means any of the following:
   1. 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.


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, 58 Wis. 2d 137, 254 N.W.2d 291 (1977).

254 N.W.2d 291

The district attorney had the discretion to charge the defendant with a Class A misdemeanor offense of sexual intercourse with a child age 16 or older under s. 948.09, a Class I felony offense of exposing intimate parts under s. 948.10 (1), and a Class D felony offense of child enticement with intent to expose intimate parts under s. 948.07 (3). It was not absurd to penalize the defendant for the felony crime of exposing intimate parts, which would be practically necessary for the misdemeanor intercourse to occur. State v. Matthews, 2019 WI App 44, 388 Wis. 2d 335, 933 N.W.2d 152, 18−0845.


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.


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, 58 Wis. 2d 137, 254 N.W.2d 291 (1977).

The district attorney had the discretion to charge the defendant with a Class A misdemeanor offense of sexual intercourse with a child age 16 or older under s. 948.09, a Class I felony offense of exposing intimate parts under s. 948.10 (1), and a Class D felony offense of child enticement with intent to expose intimate parts under s. 948.07 (3). It was not absurd to penalize the defendant for the felony crime of exposing intimate parts, which would be practically necessary for the misdemeanor intercourse to occur. State v. Matthews, 2019 WI App 44, 388 Wis. 2d 335, 933 N.W.2d 152, 18−0845.

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.
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(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) (d), 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).


To submit a lesser included offense, there must be some reasonable ground in the evidence for conviction on the lesser and acquitted 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, 53 Wis. 2d 192, 197 N.W.2d 749 (1972).

The doctrine of necessity is the proper vehicle for the "stricken word test" stated in Eastway, 189 Wis. 56 (1926), is not incorporated in the statute. Martin v. State, 57 Wis. 2d 499, 204 N.W.2d 499 (1973).

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 proscribes more serious conduct when "death is a consequence of its violation. In contrast, the homicide statute in ch. 940 targets those who "cause the death" of another. State v. Patterson, 2010 WI 130, 329 Wis. 2d 599, 790 N.W.2d 909, 08−1966.

The defendant’s guilty plea to second−degree sexual assault of a child was not knowing, intelligent, and voluntary because the defendant was incorrectly informed of the direct consequences of his plea and was entitled to withdraw it. State v. Douglass, 2021 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 permitting the jury to confirm the result. State v. Hughes, 2007 WI App 25, 228 Wis. 2d 118, 598 N.W.2d 259 (2001) (Ct. App. 1993).

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, 223 Wis. 2d 153, 590 N.W.2d 259 (Cl. App. 1999), 98−1681.

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

A crime specified in s. 940.20. Charging both was not multiplicitous and not a double jeopardy violation. State v. Davison, 2003 WI 25, 215 N.W.2d 41 (2005).

Under sub. (1), the emphasis is on the proof, not the pleading, and the "stricken word test" stated in Eastway, 189 Wis. 56 (1926), is not incorporated in the statute. Martin v. State, 57 Wis. 2d 499, 204 N.W.2d 499 (1973).

When a defendant was correctly interrogated regarding the nature of the crime and was not put to fear for his own life, not necessarily with utter disregard for the victim's life. State v. Johnson, 2021 WI 61, 207 Wis. 2d 363, 633, 961 N.W.2d 18, 18−2318.

Multiple Punishment in Wisconsin and the Wołkė Decision: Is It Desirable to Permit Two Homicide Convictions for Causing a Single Death? Abeel, 1990 WLR 553. NOTE: See also notes to Art. I, sec. 8, Double Jeopardy.
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 first-degree intentional homicide for the same act which led to battery convictions when the victim died after having been in a coma for four years. State v. McKee, 2002 WI App 148, 256 Wis. 2d 547, 648 N.W.2d 34, 01-1996.

Under this section, a subsequent prosecution is not prohibited if each provision requires proof of a fact for a conviction that the other does not require, even if the same conduct is 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 two statutes does not violate equal protection. State v. Swinson, 2003 WI App 45, 261 Wis. 2d 633, 660 N.W.2d 12, 02-0395.

This section substantially enacts the Blockburger, 284 U.S. 299 (1932), test for determining whether two offenses are the same offense for double jeopardy purposes. The test for determining whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not. State v. Triebold, 2021 WI App 13, 396 Wis. 2d 176, 955 N.W.2d 415, 19-1209.

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:

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).

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.

(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, 948.081, 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., 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.

If, before the applicable time limitation under sub. (1) or (2d) (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 (2d), 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 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 (2e), whichever is latest.

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.

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:

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 defend-
ant 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 676 (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 circuit judge decides the tolling issue under sub. (3) in a pretrial proceeding without the necessity of a finding of facts. State v. MacArthur, 2008 WI App 116, 310 Wis. 2d 550, 750 N.W.2d 910, 16−1199.

When the jury found the defendant guilty of having sexual contact with the minor during the period the defendant was a resident of another state but retaining state residence for voting and tax purposes. State v. Kollross, 2019 WI App 30, 388 Wis. 2d 135, 931 N.W.2d 263, 18−0931.


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 subsection 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) and (2) (b), 940.24 (2) or 940.25 (1) (c) to (e).


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.