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 a unit. Crimes committed prior to July 1, 1956, are not affected by chs. 939 to 951.

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

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

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

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

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

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

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

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

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

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


939.05 Parties to crime.  In this section “party to a crime” means a person who, for reasons of solicitation, command, or incitement, directly or indirectly, aids, induces, or assists another to commit a crime.


939.10 Common law crimes abolished; common law rules preserved.  The common law crimes adopted by this state and described in statutes and rules of court are abolished as of the effective date of this chapter. Before the abolition, if any, the common law rules and principles governing the common law crimes are preserved.

History: 1967 c. 270; 1977 a. 251 s. 17.

939.12 Crime defined.  A crime is any act done in violation of a criminal statute if the punishment for the act is imprisonment or a fine or both.

History: 1967 c. 270; 1977 a. 251 s. 27.

939.20 Provisions which apply only to chapters 939 to 951.  Provisions of this chapter apply only to chapters 939 to 951.

History: 1967 c. 270; 1977 a. 251 s. 32.

939.25 Criminal negligence.  CRIMES — GENERAL PROVISIONS 939.03

939.30 Solicitation.  The solicitation of a person to commit an offense is an crime if it is reasonably foreseeable that the solicitation will cause the commission of the offense.

History: 1967 c. 270; 1977 a. 251 s. 33.

939.32 Attempt.  A person who attempts to commit a crime is subject to the same punishment as if the crime had been completed.

History: 1967 c. 270; 1977 a. 251 s. 34.

939.42 Intoxication.  (a) Intoxication does not protect an person from conviction for a crime.

History: 1967 c. 270; 1977 a. 251 s. 43.

939.44 Adept.  (a) A person is not guilty of a crime if the person is unable to form the specific intent necessary to commit the crime because of some mental disorder or defect.

History: 1967 c. 270; 1977 a. 251 s. 44.

939.47 Necessity.  (a) A person is not guilty of a crime if the person acts under a reasonable belief in the necessity of doing the act to prevent imminent death or serious bodily harm to himself or herself or to another if the believed danger is threatened by a natural disaster, a public emergency, or a law or order.

History: 1967 c. 270; 1977 a. 251 s. 46.

939.49 Defense of property and protection against retail theft.  A person who retels a retail store does not commit a crime if the person acts in defense of his or her property or in defense of another person's property who is the victim of theft.

History: 1967 c. 270; 1977 a. 251 s. 47.

939.59 Classification of felonies.  A felony is any crime defined under this chapter or a crime of a similar nature defined under any other chapter of this code.

History: 1967 c. 270; 1977 a. 251 s. 50.

939.60 Felony and misdemeanor defined.  A felony is any crime defined under this chapter or a crime of a similar nature defined under any other chapter of this code. A misdemeanor is any crime defined under any other chapter of this code.

History: 1967 c. 270; 1977 a. 251 s. 52.

939.61 Classification of misdemeanors.  (a) A person is not guilty of a crime if the person acts in defense of his or her property or in defense of another person's property who is the victim of theft.

History: 1967 c. 270; 1977 a. 251 s. 54.

939.62 Increased penalty for habitual criminality.  (a) A person is not guilty of a crime if the person acts in defense of his or her property or in defense of another person's property who is the victim of theft.

History: 1967 c. 270; 1977 a. 251 s. 55.

939.63 Penalties; use of a dangerous weapon.

939.64 Increased penalty for certain crimes against children committed by a child care provider.

History: 1967 c. 270; 1977 a. 251 s. 56.

939.65 Penalties; crimes committed against certain people or property.

939.66 Conviction of included crime permitted.  (a) A person is not guilty of a crime if the person acts in defense of his or her property or in defense of another person's property who is the victim of theft.

History: 1967 c. 270; 1977 a. 251 s. 57.

939.67 Legislative history.

939.68 Limitation on the number of convictions.

939.69 Criminal conduct or contributory negligence of victim no defense.

939.70 Presumption of innocence and burden of proof.

939.71 Limitation on the number of convictions.

939.72 No conviction of both inchoate and completed crime.

939.73 Criminal penalty permitted only on conviction.

939.74 Time limitations on prosecutions.

939.75 Death or harm to a unborn child.

939.76 Lifetime supervision of serious sex offenders.

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

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

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

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

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

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

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

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

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


939.78 Jurisdiction over criminal conduct or contributory negligence of victim.

939.79 Judicial notice.

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939.83 Felony and misdemeanor defined.

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939.88 Criminal conduct or contributory negligence of victim no defense.

939.89 Presumption of innocence and burden of proof.

939.90 Limitation on the number of convictions.

939.91 No conviction of both inchoate and completed crime.

939.92 Criminal penalty permitted only on conviction.

939.93 Time limitations on prosecutions.

939.94 Death or harm to an unborn child.
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 forfeiture order. State v. Minnekeese, 253 Wis. 2d 493, 590 N.W.2d 17 (Ct. App. 1998), 98-1369.

For purposes of jurisdictional analysis, the defendant's home in Canada, the place from which the child's mother in Wisconsin was removed, is the forum court, and the consequences of the removal in Wisconsin are the jurisdictional consequences. State v. Minnekeese, 253 Wis. 2d 493, 590 N.W.2d 17 (Ct. App. 1998), 98-1369.

The place where a child is taken from a parent for the purposes of jurisdictional analysis is Wisconsin, and the mode of transportation is immaterial. State v. Minnekeese, 253 Wis. 2d 493, 590 N.W.2d 17 (Ct. App. 1998), 98-1369.

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

If there is no serious evidentiary dispute that the trial court had territorial jurisdiction over the charged crime, it could not lose jurisdiction over a lesser−included crime. State v. Randle, 2002 WI App 116, 2002 WI App 116, 252 Wis. 2d 743, 647 N.W.2d 324, 01−1448.

The constituent elements of an offense under sub. (1) (a) are those elements of the criminal offense that the state is required to prove beyond a reasonable doubt in the prosecution of the offense. A constituent element of a criminal offense is the wrongful deed that comprises the physical component or the state of mind that the prosecution must prove that a defendant had. For 1st−degree homicide, sub. (1) (a) is satisfied upon proof that the defendant committed an act in Wisconsin manifesting the intent to kill. State v. Anderson, 2005 WI 51, 280 Wis. 2d 104, 695 N.W.2d 731, 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 speedy trial issues, and not whether a circuit court can hear the case. State v. Sanders, 2018 WI 81, 381 Wis. 2d 522, 912 N.W.2d 16, 15−2328.

A defendant's age at the time he or she is charged, not the defendant's age at the time of the underlying conduct, determines whether the circuit court has statutory competency to hear the case as a juvenile criminal, juvenile delinquency, or juvenile in need of protection or services matter. Consequently, the circuit court in this case possessed statutory competency to hear the defendant's case as a criminal matter because the defendant was an adult at the time he was charged for conduct he committed before his tenth birthday. State v. Sanders, 2018 WI 81, 381 Wis. 2d 522, 912 N.W.2d 16, 15−2328.

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

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

History: 1993 a. 466.

It is desirable, but not mandatory, that an information refer to this section if the district attorney knows in advance that a conviction can only be based on participation and not the defendant cannot be convicted on the basis of his testimony in the absence of a showing of adverse effect on the defendant. Benthads 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 the crime. Benthads v. State, 49 Wis. 2d 683, 153 N.W.2d 65 (1967).

Under sub. (2) (c), a conspirator is one who is concerned with a crime prior to its actual commission and the conspirator does not have the intent to kill or otherwise cause the death. State v. Rivera, 184 Wis. 2d 485, 516 N.W.2d 391 (1994), State v. Chambers, 183 Wis. 2d 316, 515 N.W.2d 531 (App. 1994), State v. Omen, 184 Wis. 2d 263, 516 N.W.2d 399 (App. 1994).

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

The unanimity requirement was satisfied when the jury unanimously found that the defendant solicits a 2nd person to procure a 3rd person to commit a crime. State v. Yee, 160 Wis. 2d 15, 465 N.W.2d 260 (Ct. App. 1990).

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

A defendant may be guilty of felony murder, party to a crime, if the defendant participates with an accomplice in a felony listed in s. 940.03 and the accomplice kills a person. There is no requirement that the defendant have the intent to kill or otherwise cause the death. State v. Rivera, 184 Wis. 2d 485, 516 N.W.2d 391 (1994), State v. Chambers, 183 Wis. 2d 316, 515 N.W.2d 531 (App. 1994), State v. Omen, 184 Wis. 2d 263, 516 N.W.2d 399 (App. 1994).

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

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

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

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

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

Wisconsin’s party to a crime statute. The mens rea element under the aiding and abetting subsection, and the aiding and abetting–choate conspiracy distinction. 1984 WLR 2.

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

History: 1979 c. 69; 1987 a. 332 s. 64; 2007 c. 91.

The common law privilege to felony murder for one accused to refuse unlawful arrest is abolished. State v. Hobson, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), 96−0914.

939.12 Crime defined. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.
939.14 Criminal conduct or contributory negligence of victim no defense. It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent.

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

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

939.20 Provisions which apply only to chapters 939 to 951. Sections 939.22 to 939.25 apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 951.

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

939.22 Words and phrases defined. In chs. 939 to 948 and 951, the following words and phrases have the designated meanings unless the context of a specific section manifests 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. 346.11 (1v).

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

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

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

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

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

(9h) “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. 949.295 (1c) (a); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

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

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

(14) “Great bodily harm” means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurment, or which causes a permanent or protracted loss or impairment of the function of any body 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(30) “Public officer”; “public employee”. A “public officer” is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units. A “public employee” is any person, not an officer, who 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 para. (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 penetration and does not require emission.

(37) “State-certified commission warden” means a commission warden who meets the requirements of s. 328.01 (4c).

(38) “Substantial bodily harm” means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary or semi-permanent 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 alcoholic 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 alcoholic 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 (43f).

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

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

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

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

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

The definitions in subs. (9) and (9g) are sufficient that when incorporated into a probation condition they provide fair and adequate notice as to the standards to determine death is applied, as, “if one is not dead he is indeed alive.” State v. Petri, 77 Wis. 2d 431, 505 N.W.2d 477 (1993).

An automobile may constitute a dangerous weapon under sub. (10). State v. Bidwell, 200 Wis. 2d 602, 546 N.W.2d 434 (Ct. App. 1995).

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 854 (1977).

Sub. (14), either on its face or as construed in La Barge v. State, 74 Wis. 2d 327, 246 N.W.2d 764 (1976), is 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. Wiadon, 130 Wis. 2d 18, 386 N.W.2d 47 (1986).

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

An unloaded 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. Amtes, 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. State v. La Barge, 74 Wis. 2d 327, 246 N.W.2d 764 (1976).
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: 

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

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

History: 

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

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

(3) This section does not apply to s. 948.21.

History: 

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 to guilty of a Class F 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: 

939.31 Conspiracy. Except as provided in ss. 940.43 (4), 940.45 (4) and 961.41 (1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both to exceed the maximum provided for the commission of that crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

History: 

A conspiracy may be unilateral; a person can enter into a conspiracy to accomplish a criminal object even if the only defendant has a criminal intent. State v. Sample, 215 Wis. 2d 487, 757 N.W.2d 187 (1998), 96–2184.

There is a distinction between conspiracy as a substantive inchoate crime under ss. 939.31 and conspiracy as a theory of prosecution for a substantive crime under s. 939.05 (2) (c). State v. Jackson, 2004 WI App 190, 276 Wis. 2d 697, 688 N.W.2d 685, 2006–0646.

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

A person may be a member of a conspiracy — in particular, a conspiracy to manufacture a controlled substance — based on the person’s sale of goods that are illegal to sell or possess. One does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he or she knows of the conspiracy. The inference of which knowledge cannot be drawn is that the buyer will use the goods illegally. The gist of the conspiracy is the seller’s intent, when given effect by an overt act to further, promote, and cooperate in the buyer’s intended illegal use. There must be clear, unequivocal evidence of the seller’s knowledge of the buyer’s intended illegal use. State v. Rounton, 2007 WI App 178, 304 Wis. 2d 480, 756 N.W.2d 530, 06–2557.

Under a unilateral conspiracy, a person who intends to accomplish the objects of the conspiracy is guilty even though the other members of the conspiracy never intended that a crime be committed. 

This same logic applies to the next step: that
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is, when the fulfillment of the conspiracy is not only highly unlikely, but is legally impossible. State v. Huff, 2009 WI App 92, 319 Wis. 2d 258, 769 N.W.2d 154, 08–2664.

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

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

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

(bm) Whoever attempts to commit a Class I felony, other than one to which a penalty enhancement statute listed in s. 973.01 (2) (c), (e) or (f) 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) (a) is subject to the penalty provided in that paragraph for the completed act.

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

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

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

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

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

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

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

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

(1m)  **BIFURCATED SENTENCES.** If the court imposes a bifurcated sentence under s. 973.01 (4) 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, 49 Wis. 2d 246, 181 N.W.2d 490 (1970).

Attempted 1st–degree murder was shown when only the fact of the gun misfiring and the action of the intended victim prevented completion of the crime. Austin v. State, 52 Wis. 2d 716, 190 N.W.2d 887 (1971). The victim’s kicking of the defendant in the mouth and other resistance was a valid extraneous factor preventing the completion of a crime, an essential requirement for the crime of attempted rape. Adams v. State, 57 Wis. 2d 515, 204 N.W.2d 687 (1973). The screams and struggles of an intended rape victim were an effective intervening extrinsic force not under the defendant’s control. Leach v. State, 83 Wis. 2d 199, 205 N.W.2d 495 (1973).

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


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

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

The meaning of “have an intent to” in sub. (3) should be defined and interpreted in relation to all criminal statutes. State v. Weeks, 158 Wis. 2d 630, 462 N.W.2d 897 (Ct. App. 1990).

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

(2) A mistake as to the age of a minor or as to the existence or coercion or necessity so as to be privileged under s. 399.46 or 399.47; or
(3) When for any other reason the actor's conduct is privileged under any of the circumstances described in s. 399.48 or 399.49; or
(4) When the actor's conduct is a reasonable accomplishment or the scope or meaning of the terms used in that section is not a defense.

939.44 Adequate provocation. (1) In this section:
(a) “Adequate” means sufficient to cause complete lack of self-control in an ordinary 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.

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

(1) When the actor’s conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 399.46 or 399.47; or
(2) When the actor’s conduct is in defense of persons or property under any of the circumstances described in s. 399.48 or 399.49; or
(3) When the actor’s conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public officer; 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.
3. “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.
4. 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 coercion defense is limited to the most severe form of inducement. It requires finding that the actor believed he or she was threatened with immediate death or great bodily harm with no possible escape other than the commission of a criminal act. A defendant seeking a coercion defense instruction must meet the initial burden of producing evidence to support giving an instruction. That the defendant reasonably believed that a companion would attempt to harm him or her if he 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 4, 268 Wis. 2d 761, 674 N.W.2d 570, 01–1892.

939.47 Necessity. Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her 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 confirming references to the statute titles created by this bill. Since necessity mitigates first–degree intentional homicide to 2nd degree, it is obviously not a defense to prosecution for the latter crime. [Bill 191–5]

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

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

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

(1m) (a) In this subsection:
1. “Dwelling” has the meaning given in s. 895.07 (1) (b).
2. “Place of business” means a business that the actor owns or operates.

(ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:
1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor’s dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
2. The person against whom the force was used was in the actor’s dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

(b) The presumption described in par. (ar) does not apply if any of the following applies:
1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

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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 ensues as a result of a circumstance that causes the injured person to engage in that type of conduct. This privilege extends only if at least one of the following applies:

1. The person reasonably believed that his or her participation in the type of conduct was necessary to protect another; or
2. The person reasonably believed that the type of conduct was necessary to prevent or terminate the attack.

(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 person reasonably believes that the harm is necessary for the protection of the 3rd person. This privilege does not extend to the intentional use of force intended or likely to cause death to the person’s assailant unless the person reasonably believes that the force used was necessary for the protection of the 3rd person.

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

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

(6) In this section “unlawful” means either tortious or expressly prohibited by criminal law or both. History: 1987 c. 399; 1993 a. 406; 2005 a. 253; 2011 a. 94. Judicial Council 1485, 1999. Sub. (3) (a) by confining references to the statute titles as affected by this bill. [Bill 191–S]

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

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

Whether a defendant’s belief was reasonable under subs. (1) and (4) depends, in part, upon the personal characteristics, previous personal histories and whether events were continuous. State v. Jones, 147 Wis. 2d 806, 434 N.W.2d 380 (1988).

Evidence of prior specific instances of violence that were known to the accused may be presented to support a claim of self-defense. The evidence is not limited to what the accused’s own testimony, but the evidence may not be extended to the point that it is being offered to prove that the victim acted in conformity with his or her violent tendencies. State v. Daniels, 160 Wis. 2d 855, 465 N.W.2d 633 (1991).
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 agent 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, 14–1436.

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


(c) Class C misdemeanor.

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

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.
(b) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.
(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

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

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

(a) Class A forfeiture.
(b) Class B forfeiture.
(c) Class C forfeiture.
(d) Class D forfeiture.
(e) Class E forfeiture.

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

(3) Penalties for forfeitures are as follows:

(a) For a Class A forfeiture, a forfeiture not to exceed $10,000.
(b) For a Class B forfeiture, a forfeiture not to exceed $1,000.
(c) For a Class C forfeiture, a forfeiture not to exceed $500.
(d) For a Class D forfeiture, a forfeiture not to exceed $200.
(e) For a Class E forfeiture, a forfeiture not to exceed $25.


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

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

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

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

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

(3) Common law penalties are abolished.

History: 1977 c. 173.

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

(a) “Department” means the department of corrections.
(b) “Serious sex offense” means any of the following:

1. A violation, or the solicitation, conspiracy, or attempt to commit a violation, of s. 940.22 (2), 940.225 (1), (2), or (3), 940.248 (1) or (2), 984.025 (1), 948.05 (1) or (1m), 948.051, 948.055 (1), 948.06, 948.07, 948.075, 948.08, 948.085, 948.11 (2) (a), 948.12, or 948.13 or of s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.

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

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

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

(c) If the prosecutor is seeking lifetime supervision for a person who is charged with committing a serious sex offense specified in sub. (1) (b) 2., the court shall direct that the trial 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.

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

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

(c) The department shall collect moneys for the fees charged under this paragraph and credit those moneys to the appropriation account under s. 20.410 (1) (gb).

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

1. Is unemployed.
2. Is pursuing a full−time course of instruction approved by the department.
3. Is undergoing treatment approved by the department and is unable to work.
4. Has a statement from a physician certifying to the department that the person should be excused from working for medical reasons.

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

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

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

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

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

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

2. If the report of the district attorney indicates that the person filing the petition has not been convicted of a criminal offense that was committed during the period of lifetime supervision, the court shall order the person to be examined under par. (em).

(e) If a person files a petition requesting termination of lifetime supervision who is charged with committing a serious sex offense specified in sub. (1) (b) 2., the court shall direct that the trial of fact find a special verdict as to whether the conduct constituting the offense was for the actor’s sexual arousal or gratification.

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

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

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

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

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

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

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

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 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 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 5 years. Otherwise the penalties for the crime apply, subject to any applicable penalty enhancement.

(2) If a person is convicted of a violation of 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 bifurcated. State v. Laliceta, 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. 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 3 years’ initial confinement. Sub. (2) allows the court to depart from this minimum and impose less initial confinement or probation only if the defendant is not more than 48 months older than the child—State v. Holcomb, 2016 WI App 70, 371 Wis. 2d 647, 886 N.W.2d 100, 15–0996.

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

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

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


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, 943.23 (1g), 943.32 (2), 943.87, 948.03 (2) (a) or (5), 948.051, or 948.30 (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. The court may not place the defendant on probation.

### 939.6195 Mandatory minimum sentence for repeat firearm crimes. (1)

(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. The court may not place the person on probation.

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

(4) 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).

### 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 un reversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

(2m) (a) In this subsection:
1m. “Serious child sex offense” means any of the following:
1. A violation of s. 948.02, 948.05, 948.051, 948.055, 948.06, 948.07, 948.08, 948.081, 948.085, 948.095 or 948.30 or, if the victim was a minor and the convicted person was not the victim’s parent, a violation of s. 940.31.

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

2m. “Serious felony” means any of the following:
1. Any felony under s. 961.41 (1), (1m) or (1x) that is a Class A, B, or C felony or, if the felony was committed before February 1, 2003, that is or was punishable by a maximum prison term of 30 years or more.

am. A crime under s. 961.65.

b. Any felony under s. 940.09 (1), 1999 stats., s. 943.23 (1m) or (1r), 1999 stats., s. 948.35 (1) (b) or (c), 1999 stats., or s. 948.36, 1999 stats., or s. 940.01, 940.02, 940.03, 940.05, 940.09 (1c), 940.16, 940.19 (5), 940.19S (5), 940.21, 940.225 (1) or (2), 940.305, 940.31, 941.327 (2) (b) 4., 943.02, 943.10 (2), 943.23 (1g), 943.32 (2), 946.43 (1m), 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c) or (5) (a) 1., 2., 3., or 4., 948.05, 948.06, 948.07, 948.075, 948.08, 948.081, 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 subd. 2m. a., am., b., or c.

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

1. The actor has been convicted of a serious felony on 2 or more separate occasions at any time preceding the serious felony for which he or she presently is being sentenced under ch. 973, which convictions remain of record and un reversed 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 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 un reversed.

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

(b) In cases 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 pre-
scribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.


**A court’s acceptance of a guilty plea or verdict is sufficient to trigger the operation of this section; completion of sentencing is not a prerequisite.**


Felony convictions entered following a waiver from juvenile court are a proper basis for a repeater allegation. State v. Kastner, 156 Wis. 2d 371, 457 N.W.2d 131 (Ct. App. 1990).

Sub. (1) is applicable when subsequent maximum sentences are imposed for offenses committed within 10 years. Sub. (2) includes crimes punishable only by a fine.

For offenses under ch. 161 [now ch. 961], the court may apply s. 961.48 or 939.62, for which a court waived a domestic abuse surcharge pursuant to 968.075 (5) (c).

**A defendant’s admission that an out-of-state crime is a serious felony does not relieve a court of its obligation to make an independent determination on that issue.**

The trial court’s failure to make that finding did not prevent the appellate court from concluding that the admission was sufficient. State v. Collins, 2002 WI App 177, 276 Wis. 2d 697, 649 N.W.2d 325, 01–2185.

Sub. (2m) is constitutional. State v. Radke, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66, 01–0179.

A defendant convicted of a second or subsequent OWI is subject to the penalty enhancements provided for in both ss. 346.65 (2) and 939.62, if the application of both enhancements is sufficient to exceed the maximum term for the base crime.

State v. Delaney, 2003 WI 9, 259 Wis. 2d 77, 658 N.W.2d 416, 01–1051.

In determining whether a prior offense was a serious child sex offense under sub. (2m), a court may apply an element-only test but may also conduct a comparative analysis by considering whether the defendant’s conduct under the statute governing the prior conviction would constitute a felony under the current statute. State v. W. 2003 WI App 179, 260 Wis. 2d 895, 664 N.W.2d 264 (Ct. App. 1999).

The application of the persistent repeater statute requires a particular sequence of convictions: (1) the conviction date for the first offense must have preceded the violation date for the current Wisconsin offense; (2) the current conviction date for the current Wisconsin offense must have preceded the violation date for the current Wisconsin offense. State v. Long, 2009 WI 36, 317 Wis. 2d 92, 765 N.W.2d 557, 07–2031.

A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the ground that he or she was denied the constitutional right to counsel in the earlier case. The U.S. Supreme Court recognized that the defendant’s statement is not a valid waiver of counsel because 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 determine whether the defendant’s cognitive limitations into account when determining the validity of his or her waiver. State v. Bohlinger, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900, 12–1080.

(2) A defendant “spent in confinement” on a “criminal sentence,” without any regard to 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 this provision suggests that time a defendant spent in actual confinement on a criminal sentence under sub. (2) does not include time related to a motor vehicle offense conviction. State v. Cooper, 2016 WI App 63, 371 Wis. 2d 539, 885 N.W.2d 390, 15–1160/15–1161.

**939.621 Increased penalty for certain domestic abuse offenses.**

In this section, “domestic abuse repeater” means either of the following:

(a) A person who commits, during the 72 hours immediately following an arrest for a domestic abuse incident as set forth in s. 968.075 (5), an act of domestic abuse, as defined in s. 968.075 (1) (a) that constitutes the commission of a crime.

(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 imposed a domestic abuse surcharge under s. 973.055 (1), a felony or misdemeanor for which a court waived a domestic abuse surcharge pursuant to s. 973.055 (4), or a felony or a misdemeanor that was committed in another state but that, had it been committed in this state, would have subjected the person to a domestic abuse surcharge under s. 973.055 (1) or that is a crime of domestic abuse under the laws of that state.

For the purpose of the definition under this paragraph, the term “time” means that was stayed, withheld or suspended, or that the person was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 10-year period, time that the person spent in actual confinement serving a criminal sentence shall be excluded.

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

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

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

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

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

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

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

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

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1. On the premises of a school.

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

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

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

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

1. Any felony under s. 940.01, 940.02, 940.03, 940.05, 940.09 (1c), 940.19 (2), (4) or (5), 940.21, 940.225 (1), (2) or (3), 940.235, 940.305, 940.31, 941.20, 941.21, 941.02, 943.06, 943.10 (2), 943.23 (1g), 943.32 (2), 948.02 (1) or (2), 948.025, 948.03 (2) (a) or (c) or (5) (a) 1., 2., 3., or 4., 948.05, 948.051, 948.055, 948.07, 948.08, 948.085, or 948.30 (2) or under s. 940.302 (2) if s. 940.302 (2) (a) 1. b. applies.

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

3. Any misdemeanor under s. 940.19 (1), 940.225 (3m), 940.32 (2), 940.42, 940.44, 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. (2).


The violent crime in a school zone penalty enhancer is unconstitutional as applied to the defendant. The legislature seeks to deter violent crime near schools in an effort to create a safety zone around schools. The 1,000−foot perimeter is a reasonable distance to try to accomplish this legislative goal. State v. Quintana, 2007 WI App 29, 299 Wis. 2d 734, 729 N.W.2d 776, 06–0499.
(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum term of imprisonment is one year in the county jail.

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

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

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

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


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. Quirou, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, 01-1549.


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, 78 Wis. 2d 357, 254 N.W.2d 291 (1977).

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

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

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

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

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

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

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

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

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

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

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

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

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

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


To submit a lesser included offense, there must be some reasonable ground in the evidence and for conviction on the lesser and acquittal on the greater. A lesser offense is permissible when the evidence requires the jury to find a disputed factual element in the charged offense that is not required for the lesser and the jury might find the disputed fact either way. State v. Melvin, 49 Wis. 2d 246, 181 N.W.2d 489 (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 possession of a pistol by a person or an attempt to possess a pistol. State v. Quiroz, 72 Wis. 2d 228, 241 N.W.2d 260 (1976).

When the evidence overwhelmingly showed that a shooting was intentional, failure to include negligent homicide under ss. 940.06 and 940.08 as a lesser included offense was error. Hayzes v. State, 64 Wis. 2d 189, 218 N.W.2d 717 (1974).

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

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

The test under sub. (1) concerns legal, statutorily defined elements of the crime, not peculiar facts of case. State v. Muenster, 83 Wis. 2d 647, 266 N.W.2d 343 (1978).

The trial court erred in denying the defendant’s request for the submission of a verdict of endangering safety by conduct regardless of life as a lesser included offense of attempted murder. Hawthorne v. State, 99 Wis. 2d 673, 299 N.W.2d 866 (1980).

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

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

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

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

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

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

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

Convolutions for both first-degree murder and burglary battery are permissible. State v. Kunta, 160 Wis. 2d 722, 467 N.W.2d 531 (1991).

Evidence at trial may suggest to the state that an instruction on a lesser included offense is appropriate; it is unreasonable for a defendant to assume at the outset of trial...
CRIMES — GENERAL PROVISIONS 939.74

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.


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

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

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

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

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

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

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

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

(2d) (a) 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.

(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.

(3) 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. or 5., 948.04 or 948.07 (5) or (6) shall be commenced before the victim reaches the age of 26 years or be barred, except as provided in sub. (2d).

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

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

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

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

(4) In computing the time limited by this section, the time during which an alleged victim under s. 940.22 (2) is unable to seek the issuance of a complaint under s. 968.02 due to the effects of the sexual contact or due to any threats, instructions or statements of the person.

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 classifications nor the privilege of the U.S. constitution. State v. Shoner, 149 Wis. 2d 1, 437 N.W.2d 878 (1989).

A person is “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. Whitcomb, 160 Wis. 2d 263, 466 N.W.2d 193 (Ct. App. 1990).

An arrest warrant is issued for purposes of sub. (2) (a) when it is signed by a judge with the intent that it be executed and leaves the possession of the judge. That the warrant or a summons has been issued, an indictment has been found, or an information has been filed.

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

When the jury found the defendant guilty of having sexual contact with the minor victim during the period outside the statute of limitations, but also found that the victim was unable to seek the issuance of a complaint due to the effects of the sexual contact or due to statements or instructions by the defendant, the statute of limitations was tolled under sub. (6). The jury was required to agree upon a specific act committed within a specific time period but was not required to determine exactly when the aggravating offense was committed. When the date of the crime is not a material element of the offense charged, it need not be precisely alleged or determined. State v. Miller, 2002 WI App 197, 257 Wis. 2d 124, 650 N.W.2d 850, 01-1406.

When a jury already in custody due to his or her incarceration of the filing of a criminal complaint is sufficient to commence a prosecution. State v. Jennings, 2003 WI 10, 259 Wis. 2d 523, 657 N.W.2d 393, 01-0507. See also State v. Elverman, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528, 14-0534.

The common law “year—and—a-day rule” that no homicide is committed unless the victim dies within a year and a day after the injury is inflicted is abrogated, with prospective application only. State v. Picotte, 2003 WI 42, 261 Wis. 2d 249, 661 N.W.2d 381, 01-0503.

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

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

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

Sub. (2) (a) does not apply to a prosecution for attempted first-degree intentional homicide committed within six years in accordance with sub. (1). State v. Larson, 2011 WI App 106, 336 Wis. 2d 419, 801 N.W.2d 343, 10-0001.

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

When an offense is a continuing offense, the statute of limitations does not begin to run until the last act is done that viewed by itself is a crime. Reading ss. 941.20 (1) (a) and 971.36 (3) (a) and (4) together, multiple acts of theft occurring over a period of time may, in certain circumstances, constitute one continuous offense that is complete until the last act is done. State v. Elverman, 2015 WI App 91, 366 Wis. 2d 169, 873 N.W.2d 528, 14-0534.


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 (lg) (c), (cm), and (d), 940.10 (2), 940.195, 940.23 (1) (b) and (2), 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 not residing inside a woman’s body.

(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 (lg) (c), (cm), and (d), 940.10 (2), 940.195, 940.23 (1) (b) and (2), 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 subdvision 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 medical substance, 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) (b) 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 ss. 940.01 (1) (b), 940.02 (1m), 940.05 (2g), 940.06 (2), 940.08 (2), 940.09 (1) (c) to (e) or (lg) (c), (cm), or (d), 940.10 (2), 940.195, 940.23 (1) (b) and (2), 940.24 (2) or 940.25 (1) (c) to (e).

History: 1997 c. 295, 2005 c. 92, 2007 c. 109. 1995 a. 456, 940.09 (1) (c) to (e) and (lg) (c), (cm), and (d).
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.