CHAPTER 939

CRIMES — GENERAL PROVISIONS

Note: 1987 Wis. Act 399 included changes in homicide and lesser included offenses. The sections affected had previously passed the senate as 1987 Senate Bill 191, which was prepared by the Judicial Council and contained explanatory notes. These notes have been inserted following the sections affected and are credited to SB 191 as "Bill 191-S". These notes do not appear in the 1987-88 edition of the Wisconsin Statutes.

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:

(a) He commits a crime, any of the constituent elements of which takes place in this state; or

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

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

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

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

History: 1983 a. 192.

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

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

See note to Art. I, sec. 8, citing State ex rel. Skinkis v. Treffert, 90 W (2d) 528, 280 NW (2d) 316 (Ct. App. 1979).

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

See note to 346.65, citing County of Walworth v. Rohner, 108 W (2d) 713, 324 NW (2d) 682 (1982).

Unlawful arrest does not deprive court of personal jurisdiction over defendant. State v. Smith, 131 W (2d) 220, 388 NW (2d) 601 (1986).

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 he 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 he:

(a) Directly commits the crime; or

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

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

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

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

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

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

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

Evidence establishing that defendant's car was used in robbery getaway was sufficient to convict defendant of armed robbery, party to a crime, where defendant admitted sole possession of car on night of robbery. Taylor v. State, 74 W (2d) 255, 246 NW (2d) 518.

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

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

Aiding-and-abetting theory and conspiracy theory discussed. State v. Charbarneau, 82 W (2d) 644, 264 NW (2d) 227.

Withdrawal under (2) (c) must be timely. Zelenka v. State, 83 W (2d) 601, 266 NW (2d) 279 (1978).

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

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

Multiple conspiracies discussed. Bergeron v. State, 85 W (2d) 595, 271 NW (2d) 386 (1978).

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

Aider and abettor who withdraws from conspiracy does not remove self from aiding and abetting. May v. State, 97 W (2d) 175, 293 NW (2d) 478 (1980).

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

See note to 161.41, citing State v. Hecht, 116 W (2d) 605, 342 NW (2d) 721 (1984).

See note to 971.23, citing State v. Horenberger, 119 W (2d) 237, 349 NW (2d) 692 (1984).

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

Sub. (1) (c) may be violated where defendant solicits second person to procure third person to commit crime. State v. Yee, 160 W (2d) 15, 465 NW (2d) 260 (Ct. App. 1990).

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

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

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

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

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

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

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

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.

Jury instruction that defrauded party had no duty to investigate fraudulent representations was correct. Lambert v. State, 73 W (2d) 590, 243 NW (2d) 524.

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

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

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

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

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

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

(8) "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 electric weapon, as defined in s. 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

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

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

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

(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.

(22) "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

(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 any thing 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 employe". 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 employe" 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.

(34) "Sexual contact" means the intentional touching 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, or the intentional touching of any part of the body clothed or unclothed of another person with the intimate parts of the body clothed or unclothed if that intentional touching is for the purpose of sexual arousal or gratification.

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

(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 consump-

tion of an alcohol beverage or controlled substance under ch. 161 or both, of any other drug or of an alcohol beverage and any other drug.

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

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

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

(a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on him, or on a person in his presence, or on a member of his 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 he consents, either by reason of ignorance or mistake of fact or of law other than criminal law or by reason of youth or defective mental condition, whether permanent or temporary.

History: 1971 c. 219; 1973 c. 336; 1977 c. 173; 1979 c. 89, 221; 1981 c. 79 s. 17; 1981 c. 89, 348; 1983 a. 17, 459; 1985 a. 146 s. 8; 1987 a. 332, 399.

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

Unloaded pellet gun qualifies as "dangerous weapon" under (10) in that it was designed as a weapon and, when used as a bludgeon, is capable of producing great bodily harm. State v. Antes, 74 W (2d) 317, 246 NW (2d) 671.

Jury could reasonably find that numerous cuts and stab wounds constituted "serious bodily injury" under (14) even though there was no probability of death, no permanent injury, and no damage to any member or organ. La Barge v. State, 74 W (2d) 327, 246 NW (2d) 794.

Jury must find that acts of prostitution were repeated over enough or were continued long enough in order to find that premises are "a place of prostitution" under (24). Johnson v. State, 76 W (2d) 672, 251 NW (2d) 834.

Sub. (14), either on its face or as construed in La Barge v. State, 74 W (2d) 327, is not unconstitutionally vague. Cheatham v. State, 85 W (2d) 112, 270 NW (2d) 194 (1978).

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

To determine whether infant was "born alive" under (16) for purposes of the homicide laws, court applies 146.71. State v. Cornelius, 152 W (2d) 272, 448 NW (2d) 434 (Ct. App. 1989).

Dog may be dangerous weapon under (10). State v. Sinks, 168 W (2d) 245, 483 NW (2d) 286 (Ct. App. 1992).

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 he is prosecuted or the scope or meaning of the terms used in that section.

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

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

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

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

See note to 903.03 citing Muller v. State, 94 W (2d) 450, 289 NW (2d) 570 (1980).

Court properly refused to instruct jury on "mistake of fact" defense where accused claimed that victim moved into path of gunshot intended only to frighten victim. State v. Bougneit, 97 W (2d) 687, 294 NW (2d) 675 (Ct. App. 1980).

See note to 951.02, citing State v. Stanfield, 105 W (2d) 553, 314 NW (2d) 339.

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.

(2) If criminal recklessness is an element of a crime in chs. 939 to 951, the recklessness is indicated by the term "reckless" or "recklessly".

(3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being.

History: 1987 a. 399; 1989 a. 56 s. 259.

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

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

939.25 Criminal negligence. (1) In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct which the actor should realize creates a substantial and unreasonable risk of death or great bodily harm 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".

History: 1987 a. 399; 1989 a. 56 s. 259.

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

INCHOATE CRIMES

939.30 Solicitation. (1) Except as provided in sub. (2) and ss. 161.455 and 948.35, whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class D felony.

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

History: 1977 c. 173; 1989 a. 121; 1991 a. 153.

Prosecuting under 939.30 rather than 944.30 did not deny equal protection. Sears v. State, 94 W (2d) 128, 287 NW (2d) 785 (1980).

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

939.31 Conspiracy. Except as provided in ss. 161.41 (1x), 940.43 (4) and 940.45 (4), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

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

939.32 Attempt. (1) Whoever attempts to commit a felony or a battery as defined by s. 940.19 or theft as defined by s. 943.20 may be fined or imprisoned or both not to exceed one-half the maximum penalty for the completed crime; except:

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

(b) Whoever attempts to commit a battery under s. 940.20 (2) or (2m) 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.

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

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

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

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

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

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

(3) 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 he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

History: 1977 c. 173; 1981 c. 118; 1983 a. 438; 1987 a. 332; 1989 a. 336; 1991 a. 17.

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

Attempted first degree murder is shown where only the fact of the gun misfiring and the action of the intended victim prevented completion of the crime. Austin v. State, 52 W (2d) 716, 190 NW (2d) 887

The victim's kicking defendant in the mouth and other resistance was a valid extraneous factor so as to supply one of the essential requirements for the crime of attempted rape. Adams v. State, 57 W (2d) 515, 204 NW (2d) 657

Conviction of attempted rape was upheld where screams and struggles of intended victim were an effective intervening extrinsic force not under control of defendant. Leach v. State, 83 W (2d) 199, 265 NW (2d) 495 (1978)

Failure to consummate crime is not essential element of criminal attempt under (2). Berry v. State, 90 W (2d) 316, 280 NW (2d) 204 (1979)

Intervention of extraneous factor is not essential element of criminal attempt under (2). Hamiel v. State, 92 W (2d) 656, 285 NW (2d) 639 (1979).

Crime of attempted manslaughter exists in Wisconsin. State v. Oliver, 108 W (2d) 25, 321 NW (2d) 119 (1982)

To prove attempt, state must prove intent to commit specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable accused would desist of own free will. State v. Stewart, 143 W (2d) 28, 420 NW (2d) 44 (1988)

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

Meaning of "have intent to" in (3) discussed. State v. Weeks, 165 W (2d) 200, 477 NW (2d) 642 (Ct. App. 1991)

See note to 940.225, citing Upshaw v. Powell, 478 F. Supp. 1264 (1979)

DEFENSES TO CRIMINAL LIABILITY

939.42 Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or

(2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24 (3).

History: 1987 a. 399

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

Intoxication is not a defense to a charge of 2nd degree murder. Ameen v. State, 51 W (2d) 175, 186 NW (2d) 206

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

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

Voluntary intoxication instructions were proper where defendant, suffering from a non-temporary pre-psychotic condition, precipitated a temporary psychotic state by voluntary intoxication. State v. Kolisnitschenko, 84 W (2d) 492, 267 NW (2d) 321 (1978).

Intoxication instruction did not impermissibly shift burden of proof to accused. State v. Reynosa, 108 W (2d) 499, 322 NW (2d) 504 (Ct. App. 1982).

Alcoholism as a defense. 53 MLR 445

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

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

The prosecution of an individual who relies on legal opinion of a governmental official, statutorily required to so opine, would impose an unconscionable rigidity in the law. State v. Davis, 63 W (2d) 75, 216 NW (2d) 31.

939.44 Adequate provocation. (1) In this section:

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

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

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

History: 1987 a. 399

Judicial Council Note, 1988: Sub. (1) codifies Wisconsin decisions defining "heat of passion" under prior s. 940.05. Ryan v. State, 115 Wis. 488 (1902); Johnson v. State, 129 Wis. 146 (1906); Carlone v. State, 150 Wis. 38 (1912); Zenou v. State, 4 Wis. 2d 655 (1958); State v. Bond, 41 Wis. 2d 219 (1969); State v. Williford, 107 Wis. 2d 98 (1981)

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

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

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

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

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

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

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

(5) (a) In this subsection:

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

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

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

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

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

Accused had no apparent authority to drive while under influence of intoxicant. State v. Schoenheide, 104 W (2d) 114, 310 NW (2d) 650 (Ct. App. 1981).

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

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

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

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

State must disprove beyond reasonable doubt asserted coercion defense. Moes v. State, 91 W (2d) 756, 284 NW (2d) 66 (1979).

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

History: 1987 a. 399.

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

Defense of necessity is unavailable to demonstrator who seeks to stop shipment of nuclear fuel on grounds of safety. State v. Olsen, 99 W (2d) 572, 299 NW (2d) 632 (Ct. App. 1980).

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 he reasonably believes to be an unlawful interference with his person by such other person. The actor may intentionally use only such force or threat thereof as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death or great bodily harm unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

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

(b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his 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 assailant is not entitled to claim the privilege of self-defense.

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

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

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

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

History: 1987 a. 399.

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

When a defendant testifies he did not intend to shoot or use force, he cannot claim self-defense. Cleghorn v. State, 55 W (2d) 466, 198 NW (2d) 577.

Sub. (2) (b) is inapplicable to the defendant where the nature of the initial provocation is the gun-in-hand confrontation of an intended victim by a self-identified robber, for under these circumstances the intended victim is justified in the use of force in the exercise of his right of self-defense. Ruff v. State, 65 W (2d) 713, 223 NW (2d) 446.

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

Discussion of self-defense and evidence of victim's reputation for violence. State v. Daniels, 160 W (2d) 85, 465 NW (2d) 633 (1991).

A person may employ deadly force against another, if such person reasonably believes such force necessary to protect a 3rd person or one's self from

imminent death or great bodily harm, without incurring civil liability for injury to the other. Clark v. Ziedonis, 513 F (2d) 79.

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

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

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

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

History: 1979 c. 245; 1981 c. 270.

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 the person he is attempting to arrest. Clark v. Ziedonis, 368 F Supp. 544.

PENALTIES

939.50 Classification of felonies. (1) Except as provided in ss. 946.83 and 946.85, felonies in chs. 939 to 951 are classified as follows:

(a) Class A felony.

(b) Class B felony.

(c) Class C felony.

(d) Class D felony.

(e) Class E felony.

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

(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 20 years.

(c) For a Class C felony, a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.

(d) For a Class D felony, a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

(e) For a Class E felony, a fine not to exceed $10,000 or imprisonment not to exceed 2 years, or both.

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

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

(a) Class A misdemeanor.

(b) Class B misdemeanor.

(c) Class C misdemeanor.

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

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine of 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.

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

(a) Class A forfeiture.

(b) Class B forfeiture.

(c) Class C forfeiture.

(d) Class D forfeiture.

(e) Class E forfeiture.

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

(3) Penalties for forfeitures are as follows:

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

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

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

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

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

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

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

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

Legislature is presumed to have been aware of many existing statutes carrying sentences of one year or less with no place of confinement specified when it enacted predecessor to 973.02 as chapter 154, laws of 1945. State ex rel. McDonald v. Douglas Cty. Cir. Ct., 100 W (2d) 569, 302 NW (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.

See note to 779.41, citing 63 Atty. Gen. 81.

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 one year or less may be increased to not more than 3 years.

(b) A maximum term 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 6 years if the prior conviction was for a felony.

(c) A maximum term 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 10 years if the prior conviction was for a felony.

(2) The actor is a repeater if he was convicted of a felony during the 5-year period immediately preceding the commis-

sion of the crime for which he presently is being sentenced, or if he was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that he 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.

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

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

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

History: 1977 c. 449; 1989 a. 85

Cross Reference: For procedure, see 973.12.

See note to Art. I, sec. 6, citing Hanson v. State, 48 W (2d) 203, 179 NW (2d) 909

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

Because this section authorizes penalty enhancement only when maximum underlying sentence is imposed, enhancement portion of sub-maximum sentence is vacated as abuse of sentencing discretion. State v. Harris, 119 W (2d) 612, 350 NW (2d) 633 (1984).

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

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

Felony convictions entered following waiver from juvenile court are proper basis for repeater allegation; offenses were not "handled through" ch. 48. State v. Kastner, 156 W (2d) 371, 457 NW (2d) 331 (Ct. App. 1990)

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

See note to 161.48 citing State v. Ray, 166 W (2d) 855, 481 NW (2d) 288 (Ct. App. 1992).

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

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

939.621 Increased penalty for certain domestic abuse offenses. If a person commits an act of domestic abuse, as defined in s. 968.075 (1) (a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the crime is committed during the 24 hours immediately following an arrest for a domestic abuse incident, as set forth in s. 968.075 (5). The 24-hour period applies whether or not there has been a waiver by the victim under s. 968.075 (5) (c). 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 arrest. The penalty increase under this section changes the status of a misdemeanor to a felony.

History: 1987 a. 346.

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

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

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

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

4. The maximum term of imprisonment for a felony not specified in subd. 2 or 3 may be increased by not more than 3 years.

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

(c) This subsection applies only to crimes specified under chs. 161 and 939 to 951.

(2) Whoever is convicted of committing a felony while possessing, using or threatening to use a dangerous weapon shall be sentenced to a minimum term of years in prison, unless the sentencing court otherwise provides. The minimum term for the first application of this subsection is 3 years. The minimum term for any subsequent application of this subsection is 5 years. If the court places the person on probation or imposes a sentence less than the presumptive minimum sentence, it shall place its reasons for so doing on the record.

History: 1979 c. 114; 1981 c. 212; 1987 a. 332 s. 64

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

939.64 Penalties; use of bulletproof garment. (1) In this section, "bulletproof garment" means a vest or other garment designed, redesigned or adapted to prevent bullets from penetrating through the garment.

(2) If a person commits a felony while wearing a bulletproof garment, the maximum term of imprisonment prescribed by law for that crime may be increased by 5 years.

History: 1983 a. 478.

939.641 Penalty; concealing identity. If a person commits a crime while his or her usual appearance has been concealed, disguised or altered, with intent to make it less likely that he or she will be identified with the crime, the penalties may be increased as follows:

(1) In case of a misdemeanor, the maximum fine prescribed by law for the crime may be increased by not more than $10,000 and the maximum term of imprisonment prescribed by law for the crime may be increased so that the revised maximum term of imprisonment is one year in the county jail.

(2) In case of a felony, the maximum fine prescribed by law for the crime may be increased by not more than $10,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

History: 1977 c. 173; 1985 a. 104 s. 2.

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

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

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

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period 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 period 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 period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

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

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

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

"Hate crimes" law, 939.645, held to unconstitutionally infringe upon free speech. State v. Mitchell, 169 W (2d) 153, 485 NW (2d) 413 (1992).

RIGHTS OF THE PROSECUTION

939.65 Prosecution under more than one section permitted. 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.

See note to Art. I, sec. 8, citing Harris v. State, 78 W (2d) 357, 254 NW (2d) 291.

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

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

(2) A crime which is a less serious type of criminal homicide than the one charged.

(2m) A crime which is a less serious type of battery 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) The crime specified in s. 940.285 when the crime charged is specified in s. 940.19 (1m), (2) or (3), 940.225 (1), (2) or (3) or 940.30.

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

History: 1985 a. 29, 144, 306, 332; 1987 a. 332 s. 64; 1987 a. 349, 403; 1989 a. 31 s. 2909b; 1989 a. 250; 1991 a. 205.

Controlling principles as to when a lesser included offense charge should be given discussed. State v. Melvin, 49 W (2d) 246, 181 NW (2d) 490.

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

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

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

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

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

947.015 is not an included crime in 941.30. State v. Van Ark, 62 W (2d) 155, 215 NW (2d) 41.

Where the evidence overwhelmingly reveals that the shooting was intentional, failure to include 940.06 and 940.08 as lesser included offenses not error. Hayzes v. State, 64 W (2d) 189, 218 NW (2d) 717.

In order to justify the submission of an instruction on a lesser degree of homicide than that with which 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. A defendant charged with 1st-degree murder is not entitled to an instruction as to 3rd-degree murder unless the evidence reasonably viewed could lead to acquittal on both 1st- and 2nd-degree murder. Harris v. State, 68 W (2d) 436, 228 NW (2d) 645.

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

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

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

See note to Art. I, sec. 8, citing State v. Gordon, 111 W (2d) 133, 330 NW (2d) 564 (1983).

Where defendant charged with 2nd degree murder denied firing fatal shot, manslaughter instruction was properly denied. State v. Sarabia, 118 W (2d) 655, 348 NW (2d) 527 (1984).

See note to 940.19, citing State v. Richards, 123 W (2d) 1, 365 NW (2d) 7 (1985).

See note to Art. I, sec. 8, citing State v. Stevens, 123 W (2d) 303, 367 NW (2d) 788 (1985).

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

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

See note to 808.09, citing State v. Myers, 158 W (2d) 356, 461 NW (2d) 777 (1990).

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

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

RIGHTS OF THE ACCUSED

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

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

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

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

(1) Section 939.30, 948.35 or 948.36 for solicitation and s. 939.05 as a party to a crime which is the objective of the solicitation; or

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

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

History: 1991 a. 153.

Sub. (3) does not bar convictions for murder and attempted murder where defendant shot at one but killed another. Austin v. State, 86 W (2d) 213, 271 NW (2d) 668 (1978).

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

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 sub. (2), 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) A prosecution under s. 940.01, 940.02 or 940.03 may be commenced at any time.

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

(c) A prosecution for violation of s. 948.02, 948.03, 948.04, 948.05, 948.06, 948.07 or 948.08 may be commenced within the time period specified in sub. (1) or by the time the victim reaches the age of 21 years, whichever is later.

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

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

History: 1981 c. 280; 1985 a. 275; 1987 a. 332, 380, 399, 403; 1989 a. 121; 1991 a. 269.

Plea of guilty admits facts charged but not the crime and therefore does not raise issue of statute of limitations. State v. Pohlhammer, 78 W (2d) 516, 254 NW (2d) 478.

See note to 971.08, citing State v. Pohlhammer, 82 W (2d) 1, 260 NW (2d) 678.

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

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

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