OFFICE OF JUDICIAL EDUCATION
1/2024

January 2024

TO: Consumers of the Wisconsin Jury Instructions - Criminal

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 63 for the 1980 edition of Wis JI-Criminal. The release contains material approved by the Wisconsin Criminal Jury Instructions Committee through December 2023.

The following material is included in Release No. 63:

New Instructions

820 EXAMPLE 1192

1338A 1343D

1544A

Revised Instructions

140	200	640	820	870
1021	1030	1031	1185A	1187
1190	1193	1194	1211	1231
1238	1240B	1240D	1241B	1242
1244	1247A	1338	1341A	1341D
1342	1343	1344	1344A	1400C
1402A	1402B	1421	1424	1463
1463A	1466	1532	1535	1537
1750	1754	1756	1790	1900
1901	1902	1908	1925A	1925B
2146A	2176	2650	6020	6021
6030	6031	6035	6036	6038
6070	SM-6	SM-34A	SM-35	

Renumbered Instructions

1339 1544B

Filing Instructions. The material is preceded by filing instructions which should be followed carefully. It is recommended that the Filing Instructions page be retained in the front of Volume I

as a record of the proper filing of this release.

Questions. If you have any questions concerning the publication process, this release, or the criminal jury instructions project in general, please direct them to Bryce Pierson at Bryce.pierson@wicourts.gov.

OFFICE OF JUDICIAL EDUCATION

1/2024

Wis JI-Criminal

(Release No. 63 – January 2024)

Filing Instructions

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OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME I

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 1/2024 Supplement (Release No. 63)

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WISCONSIN
JURY
INSTRUCTIONS
CRIMINAL

Prepared for the Wisconsin Judicial Conference by its Criminal Jury Instructions Committee, consisting of Hon. Maureen Boyle, chair; Hon. Scott Horne; Hon. Nicholas McNamara; Hon. Michael Moran; Hon. Thomas Walsh; Hon. Patricia Baker; Hon. Michelle Havas; Hon. Ralph Ramirez; Hon. Laura Crivello; Hon. Mark Sanders; Hon Scott Blader with assistance from Assistant Attorney General Christine Remington; Assistant State Public Defender Katie York; University of Wisconsin Law School Professor Emeritus David E. Schultz and Office of Judicial Education Legal Advisor Bryce Pierson.

Reporter:
Bryce Pierson
Office of Judicial Education

Published by
Wisconsin Court System
Office of Judicial Education

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SUMMARY OF CONTENTS

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FOREWORD

Since 1959, the Wisconsin Jury Instructions project has produced over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at the conclusion of a trial. In 2020, the Jury Instructions project was transferred entirely to the Wisconsin Court System after 60 years as a cooperative effort between the Judicial Conference and the University of Wisconsin Law School. Publication and distribution of the Wisconsin Jury Instructions – Criminal is now managed by the Office of Judicial Education with the assistance of the Wisconsin State Law Library. Throughout its sixty-four years of existence, the Wisconsin jury instructions model has proven unique in its longevity, continuity, and orientation toward the trial judge. Despite several structural changes over the last six decades, these distinctive aspects have remained consistent, and the jury instructions model has continued without interruption.

The instructions provided in Wisconsin Jury Instructions – Criminal respond to a need for a comprehensive set of instructions to assist judges, juries, and lawyers in performing their role in criminal cases. All published jury instructions share the same objective to provide a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.

This set of instructions has been enriched by valuable suggestions from the judges and lawyers who have used the instructions in preparing trials, as well as presenting cases to juries. The Committee hopes this set will continue to receive the same valuable scrutiny from those who use it. We are proud of this publication and hope those who use it find it valuable.

July 2023

Bryce Pierson
Legal Advisor & Committee Reporter
Office of Judicial Education

COMMITTEE HISTORY

Foundation of the Wisconsin Criminal Jury Instructions 1959-1962

The origins of the Wisconsin Criminal Jury Instructions Committee and the model it employs to produce jury instructions date back to 1959. In that year, the University of Wisconsin-Extension, Department of Law, in partnership with the Board of Criminal Court Judges, put together the first "institute" on criminal jury instructions. Initially organized as a general traffic court conference, the Board of Criminal Court Judges ultimately revised the subject matter of the institute to focus on jury instruction at the suggestion of Circuit Judge Gerald Boileau of Wausau[1]. Judge Boileau's recommendation stemmed partly from his involvement in creating the new Wisconsin Criminal Code that took effect in 1956.[2] During the development of the Criminal Code, it became evident to the drafters that reference work did not exist, which could assist Wisconsin judges and attorneys in preparing jury instructions. Concluding that the newly defined crimes required such instructions, the Board of Criminal Court Judges agreed with Judge Boileau. It then directed the institute to focus on drafting formal model instructions so that the bench would not have to rely on instructions informally passed from judge to judge.

The format of the "institute," which established the committee model still in use today, is credited to University of Wisconsin law professor Frank J. Remington[3]. In a letter to Judge Boileau concerning his expert advice on the subject, Professor Remington advocated that judges take primary responsibility for the program. Expounding upon his position, Professor Remington explained, "I think this is right because the giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience." The institute's model, therefore, became oriented around trial judges and their instructional practices and policies.

Once the content and format of the institute were agreed upon, a conference date of June 10 and 11, 1959 was set. The primary objective of the meeting was to develop model instructions that would assist judges and trial attorneys in the submission of criminal cases to juries.[4] To facilitate this task, the Committee requested that trial judges send in copies of instructions they regularly used.[5] Additionally, the research staff presented proposed instructions, which the Committee analyzed, debated, and rewrote many times before the members attained unanimous approval. Although many conference attendees may have anticipated that their work would be complete once they addressed the new Criminal Code, this proved not to be the case.

After a second jury instructions conference in February of 1960, the attendees agreed that a regular committee was necessary to draft a complete set of criminal jury instructions. In response, the Board of Criminal Court Judges adopted a resolution that

called for the appointment of a five-member committee[6] to collaborate with the University

of Wisconsin Extension, Department of Law in preparing model jury instructions for criminal cases. The Jury Instructions Committee continued to meet regularly, and its existence was made permanent shortly before it completed the first edition of the model criminal jury instructions in 1962.[7]

Development of the Original Model Instructions

In the summer of 1962, the Committee published its inaugural edition of model jury instructions. The single-volume edition included both an introduction by Judge Boileau[8] and a Preface by editor John H. Bowers[9]. The advice and expectations for how the instructions should be used provided in the original edition remain accurate today.

Continuity of publication has been a trademark of the criminal jury instructions model since the original edition was published in 1962. In 1966, the Committee produced its first preliminary supplement to the original edition that updated material and added new instructions. The Committee also completed additional supplements to the 1962 edition in 1967, 1971, 1974, and 1976. These supplements expanded the Committee's original work from one to three volumes and completed the development of the first edition. Following the publication of the 1976 supplement, the Committee's production rate briefly declined due to funding difficulties. However, the University of Wisconsin was able to obtain temporary federal funding through the Wisconsin Council on Criminal Justice, which allowed for the hiring of additional staff to assist the Committee in completing its first substantial revision to the criminal jury instructions in 1980. This new edition increased the page size from the original 6 by 9 to 8 1/2 by 11, and became the basis from which all future supplements were added. Supplementation of the 1980 edition has continued frequently, with each new supplement designated as "Release No._____." In 1986, supplemental Release No. 15 expanded the Committee's work to four volumes. As of July 2020, 58 supplements have been added to the 1980 revised edition.

Court Reorganization and Publication Incorporation into the Wisconsin Court System

In 1978, the Wisconsin court system was reorganized, and the old statutory boards, including the Board of Criminal Court Judges, were abolished. The Criminal Jury Instructions Committee was reconstituted as a standing committee of the Wisconsin Judicial Conference, and membership was increased to eleven judges. In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as the Office of Continuing Education and Outreach. That office was renamed Continuing Education and External Affairs in 2016. In 2021, the University of Wisconsin transitioned its publication responsibilities to the Wisconsin Court

System's Office of Judicial Education. That same year, in partnership with the Wisconsin State Law Library, the Office of Judicial Education converted the production of supplemental releases from physical copies to an all-digital format. The entire set of Wisconsin Jury Instructions-Criminal is now available at no cost to the user in Word and PDF format at https://wilawlibrary.gov/jury

Characteristics of the Wis JI-Criminal Model

Several characteristics of the criminal jury instructions model add significantly to the product's strength and value. First and foremost is the model's orientation toward the trial judge. As the giving of instructions is exclusively a judicial function, a primary focus of the Committee is to assist colleagues on the trial bench who may handle a wide variety of cases. A common point of reference for the Committee when discussing a new or amended instruction is the hypothetical judge faced with a criminal trial issue after rotating from a civil or family law caseload.

Another important aspect of the model's orientation toward the trial judge is the Committee's make-up. The eleven voting members of the Committee are judges[10], and only they can approve proposed instructions or amendments. Additionally, the Committee's ability to approve and publish model instructions is done without any additional endorsement by the Judicial Conference or the Supreme Court. A direct result of this arrangement is that trial judges are allowed to use model instructions as guides instead of directives. When necessary, a trial judge may depart from the exact language of the instruction if it does not fit the facts of the case or when they believe an improvement to the instruction can be made. This is opposed to a model, like that implemented in Missouri, in which instructions are approved by order of the state supreme court and must be given without change.

Finally, another unique aspect of the criminal jury instructions model is its association with the notion of "law in action." This concept examines the role of law, not just as it exists statutorily or in case law, but as it is actually applied in the courtroom. The incorporation of this concept into the jury instructions model can be drawn back to the original partnership with the University of Wisconsin Law School and its pursuit of the Wisconsin Idea[11]. Utilizing the assistance of experts like Professor Frank J. Remington and Assistant Attorney General William A. Platz, early versions of the Wisconsin jury instructions committees provided an all-inclusive perspective of the law. Over the years, the committees have sought to continue this practice by recruiting member judges from across the state and support from non-voting advisors and law school faculty. Although the University of Wisconsin is no longer part of the jury instructions model, the committees and the Wisconsin Court System still strive to achieve the objectives embodied in the "law in action" concept.

How to Use the Model Jury Instructions[12]

Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. While the general instructions may frequently be used without change, instructions on the substantive offenses may often have to be modified to fit the needs of the particular case. The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered.

It is suggested that the comment and the footnotes be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Words and phrases which are to be used alternatively appear in parenthesis and italics. Words and phrases which are not appropriate for every case, but which should be given in some situations, are in brackets. Editorial directions which alert the user to alternatives or to the need to insert material or other instructions are found in brackets in the body of the instruction or in the comment.

The book itself may be cited as "Wis JI-Criminal" and each instruction by adding the appropriate number . . . It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he or she point out the nature of the change and the reason therefore.

INQUIRIES AND SUGGESTIONS

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and recommendations from those the Committee is trying to serve. Individuals are encouraged to contact the reporter by phone, mail, or e-mail or consult with any Committee member. Copies of approved but not published material are available from the reporter, as are working drafts.

For information on the status of the Committee's drafting of new or revised instructions, please contact:

Bryce Pierson
Legal Advisor & Reporter – Jury Instructions
Office of Judicial Education
110 E. Main St., Ste. 200
Madison, WI 53703-3328
Phone: (608) 285-2209
Email: Bryce.pierson@wicourts.gov

The Criminal Jury Instructions Committee
Current Members and Advisors as of 2023

Judges

Maureen Boyle, Chair	Barron Co.
Scott Horne	La Crosse Co.
Michael Moran	Marathon Co.
Nicholas McNamara	Dane Co.
Thomas Walsh	Brown Co.
Patricia Baker	Portage Co.
Michelle Havas	Milwaukee Co.
Ralph Ramirez	Waukesha Co.
Laura Crivello	Milwaukee Co.
Mark Sanders	Milwaukee Co.
Scott Blader	Wausahra Co.

Advisory Members

Christine Remington	Wis.Dept. of Justice
Katie York	Wis. State Public Defender
David Schultz	Prof. Emeritus, Univ. of Wis. Law School

Reporter

Bryce Pierson	Wis. Office of Judicial Edu.

The Criminal Jury Instructions CommitteeMembers and Advisors

Judges

Gerald Boileau	Marathon Co.	1960-1975 Chair
William Gramling	Waukesha Co.	1960-1976
Milton Meister	Washington Co.	1960-1978
Herbert Steffes	Milwaukee Co.	1960-1975
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James Levi	Portage Co.	1965-1984 Chair
John Buchen	Sheboygan Co.	1974-1989
James Seering	Sauk Co.	1974-1989
Edwin Dahlberg	Rock Co.	1975-1998 Chair
Hugh O'Connell	Milwaukee Co.	1976-1983
John Bartholomew	St. Croix Co.	1976-1989
Robert Stoltz	Washington Co.	1977-1978
Ronald Keberle	Marathon Co.	1979-1992
Robert Landry	Milwaukee Co.	1979-1991
Michael Torphy	Dane Co.	1979-1992
Donald Steinmetz	Milwaukee Co.	1979-1980
Fred Fink	Wood Co.	1980-1985
Patrick Madden	Milwaukee Co.	1983-1994
Richard Becker	Washington Co.	1984-1994
Fred Fleishauer	Portage Co.	1986-1996
Raymond Gieringer	Adams Co.	1988-1991
Mark Gempeler	Waukesha Co.	1988-1998
Gregory Peterson	Eau Claire Co.	1990-2002 Chair
William Carver	Winnebago Co.	1990-2000
Victor Manian	Milwaukee Co.	1991-2003 Chair
James Eaton	Barron Co.	1991-2001
Angela Bartell	Dane Co.	1992-2002
Michael Fisher	Kenosha Co.	1992-2002

James Schwalbach	Washington Co.	1994-1997
Thomas Doherty	Milwaukee Co.	1994-1998
Edward Zappen	Wood Co.	1996-2006 Chair
John DiMotto	Milwaukee Co.	1997-2007 Chair
Kitty Brennan	Milwaukee Co.	1998-2008
James Daley	Rock Co.	1998-2008 Chair
Donald Zuidmulder	Brown Co.	1998-2008
Mark Mangerson	Oneida Co.	2000-2010 Chair
Scott Needham	St. Croix Co.	2001-2011 Chair
Don Hassin	Waukesha Co.	2002-2012 Chair
Steve Ebert	Dane Co.	2002-2007
Annette Ziegler	Washington Co.	2002-2007
John Franke	Milwaukee Co.	2003-2008
Thomas Flugaur	Portage Co.	2006-2016 Chair
Jeffrey Kremers	Milwaukee Co.	2007-2017 Chair
John Damon	Trempeleau Co.	2007-2016
Mary Ann Sumi	Dane Co.	2007-2014
Rory Cameron	Chippewa Co.	2008-2016
Mel Flanagan	Milwaukee Co.	2008-2016
Rebecca Dallet	Milwaukee Co.	2008-2018
Andrew Bissonnette	Dodge Co.	2008-2013
Guy Reynolds	Sauk Co.	2011-2018
William Hanrahan	Dane Co.	2015-2020
D. Todd Ehlers	Door Co.	2010-2020 Chair
Thomas Eagon	Portage Co.	2016-2022
Stephanie Rothstein	Milwaukee Co.	2016-2022
William Domina	Waukesha Co.	2012-2022 Chair
Frederick Rosa	Milwaukee Co.	2017-2022
Mitch Metropulos	Outagamie Co.	2013-2023 Chair
Jane Carroll	Milwaukee Co.	2018-2023

Advisory Members

	Wis. Dept. Of Justice	**Wis. State Public Defender**	
William Platz	1960-1975	Richard Martin	1993-1995

Bill Gansner	1976-1979
Edward Marion	1979-1980
Marjorie Moeller	1980-1981
Kirbie Knutson/ Chris Heikenen	1981-1986
David Becker	1987-2010
Barbara Oswald	2010-2011
Gary Freyberg	2011-2017
Annie Jay	2017-2022

Randall Paulson	1996-2001
Charles Vetzner	2001-2007

Univ. of Wis. Law School

Frank J. Remington	1960-1996
Walter Dickey	1995-1997

Reporters

Arnon Allen	1960-1961
John Bowers	1961-1976
Adv. Member	1976-1994
George Frederick	1963-1966
Donald Bruns	1972-1975
David Schultz	1976- 2019

Copy Editors

Barbara Muckler	1966-1978
Roger Bruesewitz	1978-2001

Comment

This introduction was approved in August 2021. It expanded upon the 2018 introduction and incorporated a new format.

1. When the first edition was published in 1962, it was dedicated to the Committee's first chair, Circuit Judge Gerald Boileau from Wausau. The dedication reads as follows:

> DEDICATION
>
> The following resolution was unanimously passed by the WisconsinBoard of Criminal Court Judges at its annual meeting in June of 1961:
>
> WHEREAS, the Hon. Gerald J. Boileau has been the only Chairman of the Board's Committee on Criminal JuryInstructions, and;
>
> WHEREAS, the monumental work of this Committee, which will ultimately lead to the publication of model instructions for the use of this State, is due largely to the untiring and dynamic leadership of the Hon. Gerald J. Boileau, and;
>
> WHEREAS, the Hon. Gerald J. Boileau has in the past made significant contributions to the advancement of his profession in that he has been Chairman of the Wisconsin Board of Circuit Judges, Chairman of the Wisconsin Board of Criminal Court Judges, a member of the Judicial Council of this State for many years, and Chairman of the Criminal Code Advisory Committee which drafted the new Criminal Code in its final version;

> Be it therefore, resolved, that when Wisconsin Jury Instructions – Criminal is published, it be dedicated to the Hon. Gerald J. Boileau in recognition of his interest, his advice, and his time so freely given to his profession.

2. Several of the original members had strong ties to the development of the 1956 Criminal Code. The original judge members were:

- Hon, Gerald J. Boileau, Wausau, Chairman
- Hon. Herbert J. Steffes, Milwaukee

- Hon. William E. Gramling, Waukesha
- Hon. Milton L. Meister, West Bend
- Hon. Clarence Whiffen, Racine
- Hon. Charles Larson, Port Washington (ex officio)
- Hon. Howard DuRocher (ex officio)
- Hon. Henry Gergen, Beaver Dam [replaced Judge Whiffen in 1961]

Assistant Attorney General Bill Platz and Professor Frank Remington, who served as advisors to the criminal jury instructions effort, also had leading roles in developing the Criminal Code.

3. The original advisory members were two outstanding criminal law experts: Professor Frank J. Remington and Assistant Attorney General William A. Platz. In speaking about them, the 1966 foreword stated: "The Committee could have found no better qualified individuals than William Platz and Frank Remington for technical advisors. Suffice it to say that the aid of these two men has been invaluable."

Frank Remington's efforts were recognized in the foreword to the 1966 supplement:

> Frank Remington has such impressive credentials in the field of criminal law that we need not spell them out here. He was one of the principal researchers on the massive revision of the Wisconsin Criminal Code. As a member of the Law School faculty since 1949, he has been specializing in the study of criminal law. He has brought nationwide distinction to the Law School as a center for research and teaching in criminal law and the administration of criminal justice.

William Platz's contributions were further described in an in memoriam tribute published in 1980:

> William A. Platz had no peer in the field of criminal law. For nearly four decades, he was counsel to every district attorney and every law enforcement officer in the State of Wisconsin, always available and willing,cheerfully, to give advice. And no more knowledgeable, trustworthy help was available anywhere.
>
> He possessed not just a singular knowledge and devotion to the justice system but a keen wit and fine sense of humor as well. His wit and wisdomforever remain with all who knew this fine outstanding man.

4. The Committee's principal objectives were:

> 1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful andhelpful to the jury.
> 2. To make readily available such instructions as a trial judgewould likely need in the trial of a criminal case to a jury.
> 3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, whichbecame effective July 1, 1956, and to make such changes therein as seemed to be advisable as a result of such enactment; and, generally, to relate the instructions to the newCriminal Code.
> 4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.
>
> Introduction To The 1962 Edition – Judge Gerald Boileau, Chairman Committee on Jury Instructions – Criminal

5. Foremost among the judges who supplied copies of instructions regularly used to the institute was Judge Herbery Steffes of Milwaukee. Prior to the formation of the Wisconsin Criminal Jury Instructions Committee, Judge Steffes had served as an informal "instruction bank," and much of his work product can be found in the instructions today.

6. See Comment 2. Non-voting advisors also included Professor Gordon Baldwin and Professor William B. Smith.

7. The Board unanimously adopted the following resolution on February 15, 1962:

> RESOLVED, that the jury instructions in criminal cases, which have been prepared by the committee appointed for that purpose, are hereby approved, but without certification of said instructions' freedom from error; be it further
> RESOLVED, that said committee is hereby made a permanent committee to prepare additional instructions for use in criminal cases and to amend or correct any previously approved instructions whenever such committee deems such action to be appropriate

8. INTRODUCTION TO THE 1962 EDITION:

> The Wisconsin Board of Criminal Court Judges, realizing that no ready reference work was available to assist the bench and the bar of the State of Wisconsin in the preparation of jury instructions in criminal cases, authorized and directed our committee, consisting of five trial judges, to study the problem and submit to the Board such suggested instructions as, in the committee's opinion, would assist judges and trial lawyers in the submission of criminal cases to juries.
>
> Prof. Frank J. Remington, of the University of Wisconsin Law School, and Mr. William Platz, Assistant Attorney General of Wisconsin, graciously accepted our invitation to become unofficial members of the committee and have made substantial contributions to what success we have achieved. The University of Wisconsin Extension Law Department, under the direction of William Bradford Smith, has provided research assistants and has paid all expenses necessarily incurred in the preparation of these instructions.

> The committee has met on an average of once a month for the past three years, such meetings lasting from one to three days. All members, both official and unofficial, have been most regular in their attendance at these meetings. These were the committee's objectives:
>
> 1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful and helpful to the jury.
> 2. To make readily available such instructions as a trial judge would likely need in the trial of a criminal case to a jury.
> 3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, which became effective July 1, 1956, and to make such changes therein as seemed to be advisable as a result of such enactment; and, generally, to relate the instructions to the new Criminal Code.
> 4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.
>
> In the progress of our work the research staff presented proposed drafts. These drafts were prepared after a study of all available material. At our meetings, the committee analyzed every instruction minutely, giving thorough consideration to every word and phrase in the prepared draft and to all available authorities and precedents which seemed to be pertinent. Many instructions were corrected and rewritten many times. Finally, each instruction had the unanimous approval of the committee. Certainly, we make no claim that these instructions are free from error. We propose to continue our work as a permanent committee, adding new instructions from time to time, and correcting previously approved instructions when errors are called to our attention. We invite suggestions from the bench and the bar. We hope this work will, to some extent at least, achieve its objectives.
>
> Gerald J. Boileau, Chairman
> Committee on Jury Instructions Criminal

9. John H. Bowers was the original editor/reporter for the publication. The Introduction to the 1980 Edition recognized his contributions:

> The Committee has been fortunate to have the services of John H. Bowers, Attorney at Law, Madison, and former Deputy Attorney General, State of Wisconsin, as reporter and editor from 1961 through 1976. During that time John was responsible for most of the reporting and drafting chores.His services over the years have been of the greatest importance.

10. The Judicial Conference increased Committee membership to eleven judges to expand and update the Special Materials at a quicker rate.

11. The Wisconsin Idea is often described as being based on the principle that "the boundaries of the University are the boundaries of the State." It also has a second aspect which recognizes that University faculty and staff who participate in activities like the jury instructions projects use the experience to enrich

their teaching, research, and service responsibilities.

12. Much of the language provided in the "How to Use" section comes from the Preface to the 1962 edition of Wisconsin Jury Instructions-Criminal authored by Editor John H. Bowers. The advice and expectations for how the instructions should be used provided by Mr. Bowers in the original edition remain accurate today.

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947.15(1)(b)	(1961 INSTRUCTION WITHDRAWN)
948.01(3)	2106A
948.01(5)	2101A
948.01(6)	2101B
948.02(1)	2102, 2102A
948.02(1)(b)	2102B
948.02(1)(c)	2102C
948.02(1)(d)	2102D
948.02(1)(e)	2102E
948.02(2)	2104, 2105A, 2105B
948.02(3)	2106
948.02(3m)	2114
948.025	2107
948.025(1)(b)	2107 EXAMPLE
948.025(2m)	2114
948.03(2)(a)	2108
948.03(2)(b)	2109
948.03(2)(c)	2110
948.03(3)(a)	2111
948.03(3)(b)	2112
948.03(3)(c)	2113
948.03(4)(a)	2108A, 2108B
948.03(5)	2114
948.04	2116
948.05(1)(b)	2120, 2120A
948.05(1m)	2122
948.05(2)	2123
948.05(3)	2120A
948.051	2124
948.055	2125
948.06(1)	2130
948.06(1m)	2131
948.07	2134, 2134A, 2134B
948.075	2135
948.08	2136
948.081	2136A
948.085	2137A, 2137B
948.09	2138
948.093	2138A
948.095	2139, 2139A
948.10	2140, 2141
948.11(2)(a)	2142, 2142A
948.11(2)(am)	2143
948.11(2)(c)	2142A
948.12(1m)	2146A, (2146 INSTRUCTION WITHDRAWN)
948.12(2m)	2146B
948.13	2147
948.14	1984, 2196
948.20	2148
948.21	2150, 2150A
948.215	2151
948.22	2152, 2152A
948.23(1)(a)	2154
948.30(1)(a)	2160
948.30(1)(b)	2161
948.30(2)(a)	2162
948.30(2)(b)	2163
948.31(1)(b)	2166
948.31(2)	2167, 2167A
948.31(3)(a)	2168
948.31(4)	2169
948.40(1)	2170, 2170A
948.40(2)	2171
948.45	2173
948.53(2)(a)	2175
948.55(2)	2185
948.60	2176, 2177
948.60(2)(c)	2177A
948.605(2)	2178A
948.605(3)	2178B
948.61	2179
948.62	2180
951.02	1980
951.03	1983
951.08	1986, 1988
951.095	1981
951.13	1982
951.14	1984
951.18(1)	1983
951.18(2m)	1981
961.01(4m)	6005, 6020A
961.41	6031
961.41(1)	6001, 6020, 6020A, 6021
961.41(1m)	6001, 6035, 6036
961.41(3g)	6030, 6031
961.41(4)(am)	6040
961.41(4)(bm)	6042
961.42	6037, 6037A, 6037B
961.43(1)(a)	6038
961.437(2)(a)	6044
961.455	6046, 6047
961.46	6002
961.465	6003
961.49	6004
961.573(1)	6050
961.573(3)	6053
961.65	6065

Wis. Stat. §	Wis JI-Criminal
968.06	(SM-10 INSTRUCTION WITHDRAWN)
968.075(5)	2044
968.12,.13	(SM-62 INSTRUCTION WITHDRAWN)
968.26	SM-12
968.27-.33	(SM-62 INSTRUCTION WITHDRAWN)
969.01(2)	SM-30A
969.01(2)(b)	(SM-39 INSTRUCTION WITHDRAWN)
970.02	SM-25, SM-30
970.03	SM-31
971.04	SM-18
971.08	SM-32
971.11(2)(b)	1200G
971.12(3)	220, 220A, 220B
971.14	SM-50
971.15-.175	600-662
971.17(1)	SM-50A
971.19(1)	267
971.20	(SM-15 INSTRUCTION WITHDRAWN)
971.31	(SM-60, SM-61, SM-62 INSTRUCTIONS WITHDRAWN)
972.01	SM-20
972.08	246, SM-55
972.10(1)	55, 56, 101, 102, SM-9
972.11(2)(b)2	1200G
973.01-.17	SM-34
973.015	SM-36
973.15(8)	SM-30A, SM-39
973.155	SM-34A
974.06	(SM-70, SM-33B INSTRUCTIONS WITHDRAWN)
975.01, et al.	(1550-1553, SM-40 INSTRUCTIONS WITHDRAWN)
975.17	SM-41
976.05	SM-90
Ch. 980	2501, 2502, 2503, 2505, 2506

140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless, in your deliberations, you find it is overcome by evidence that satisfies you beyond a reasonable doubt that the defendant is guilty.[1]

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence,[2] you must do so and return a verdict of not guilty.

Meaning of Reasonable Doubt

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given,[3] arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs

of life.[4]

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.[5]

COMMENT

Wis JI-Criminal 140 and comment were originally published in 1962 and revised in 1983, 1986, 1987, 1991, 1994, 2016, 2019, and 2023. The instruction was republished without substantive change in 2000. The 2019 revision expanded on footnote 5. The 2023 revision added a reference to the decision in State v. Trammell, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564. This revision was approved by the Committee in October 2023; it replaced the word "should" with "must" in the "reasonable hypothesis" section to better align with the criminal instructions set.

This instruction must be provided to the jury in writing. Section 972.10(5) was amended by order of the Wisconsin Supreme Court dated April 30, 1986, to require that the instruction "providing the burden of proof" be included among those provided to the jury in writing. Compare E. B. v. State, 111 Wis.2d 175, 330 N.W.2d 584 (1983), where the Wisconsin Supreme Court held that Wis JI-Criminal 140 was not one of the "substantive" instructions that were to be provided to the jury in writing under the former version of § 972.10(5).

For early discussions of definitions of "beyond a reasonable doubt," see Anderson v. State, 41 Wis. 430 (1877); Emery v. State, 92 Wis. 146, 65 N.W. 848 (1896); Emery v. State, 101 Wis. 627, 650 56, 78 N.W. 145, 152 (1899). Also see Hoffman v. State, 97 Wis. 571, 576, 73 N.W. 51 (1897), where, in reference to the instruction on "reasonable doubt," the court stated: "It needs be a skillful definer who shall make the meaning of the term more clear by the multiplication of words."

The proper definition of "beyond a reasonable doubt" continues to receive attention from appellate courts and persons concerned with the understandability of jury instructions. So-called plain language versions are suggested by the Federal Judicial Center Committee to Study Criminal Jury Instructions in Pattern Criminal Jury Instructions (1982) (available in a pamphlet from West Publishing Company) and in Sales, Elwork, and Alfini, Making Jury Instructions Understandable (Michie, 1982). Some appellate courts have concluded that "beyond a reasonable doubt" cannot be helpfully defined and that there should be no instruction attempting to define it. For example, the United States Court of Appeals for the Seventh Circuit

has concluded that the phrase is "self explanatory and is its own best definition." Federal Criminal Jury Instructions of the Seventh Circuit 2.07, p. 18 (1980). Also see United States v. Kramer, 711 F.2d 789, 794 95 (7th Cir. 1983).

The Committee has carefully reviewed Wis JI-Criminal 140 several times in light of the above. Only minor changes have been made in the text, as it was originally drafted in 1962. As the notes below indicate, several parts of the instruction have been approved by the Wisconsin appellate courts. Several cases have held it is error not to give certain parts of the instruction upon request. Rather than risk creating appellate issues by significantly changing the instruction, the Committee decided it was better to retain the original version.

The Committee reviewed Wis JI-Criminal 140 in 1994 in light of a decision of the United States Supreme Court that analyzed definitions of "beyond a reasonable doubt." See Victor v. Nebraska, 511 U.S. 1 (1994). A second case, Sandoval v. California, 511 U.S. 1101 (1994), was addressed in the same decision. The primary issue before the court was the use of "moral certainty" in the definition of "beyond a reasonable doubt." The instruction in Sandoval read as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on **moral evidence**, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a **moral certainty**, of the truth of the charge. [Emphasis added.]

After extensive consideration of what the terms mean today, the court concluded that in the context of all the instructions, the use of "moral evidence" and "moral certainty" was not error.

Wis JI-Criminal 140 has never included the reference to "moral certainty" that is so common in definitions of "beyond a reasonable doubt." The primary case law source for the Wisconsin instruction was Emery v. State, 101 Wis. 627, 78 N.W. 145 (1899). The instruction reviewed there included "moral certainty," but it was not a litigated issue. The early Committee clearly relied on Emery but did not adopt the "moral certainty" language.

One other part of the Sandoval instruction was reviewed – the reference that reasonable doubt "is not a mere possible doubt." The Court rejected the argument, holding the rest of the instruction puts it into proper context. Wis JI-Criminal 140 does not refer to "possible doubt."

The instruction given in Victor was very similar to the one in Sandoval; it included a reference to "moral certainty." But Victor raised two other issues. The Victor instruction defined "reasonable doubt" as "an actual and substantial doubt arising from the evidence." The Court said this was "problematic," since "substantial" could be taken to mean "a large degree," which might be more than the "reasonable" doubt required for acquittal. But the court found that the rest of the instructions put this into proper context by distinguishing it from "mere possibility, from bare imagination, or from fanciful conjecture." Wis JI-Criminal 140 does not refer to "substantial doubt." The Victor instruction also stated: "You may find an accused guilty upon the strong probabilities of the case." The Court found no error: "strong probabilities" was immediately defined as "strong enough to exclude any reasonable doubt."

So, as far as the majority decisions in Victor and Sandoval are concerned, there is nothing that requires or even suggests any change in Wis JI-Criminal 140: none of the challenged language appears in Wis JI-

Criminal 140; and the Court found no error in the use of such language.

Three justices found fault with a different aspect of the instruction used in Victor:

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying acting thereon.

Wis JI-Criminal 140 has a rough equivalent of this statement, which Justice Ginsberg criticized, citing the conclusion of the committee that drafted the Federal Judicial Center instructions. She also commended the definition of reasonable doubt provided in those instructions. The Committee previously reviewed the Federal Judicial Center instruction and did not believe it was a substantial improvement on Wis JI-Criminal 140. And Wisconsin case law specifically supports including such a statement. See note 4, below.

The Committee carefully reviewed Wis JI-Criminal 140 again after the Wisconsin Supreme Court decision in State v. Trammell, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564. Trammell considered arguments that four provisions of Wis-JI Criminal 140, when considered together, unconstitutionally reduced the burden on the state to prove guilt beyond a reasonable doubt. The provisions are: 1) the "important affairs of life" analogy (see also note 4, below); 2) the "reasonable hypothesis consistent with the defendant's innocence" statement (see also note 2, below); 3) the negative definition of reasonable doubt, which specifies that a reasonable doubt is not a doubt based on guesswork or speculation or arising from sympathy or a fear to return a verdict; and 4) the "search for the truth" language (see note 5, below). The Supreme Court reviewed each of the challenged passages in the context of the instructions as a whole and concluded that Wis JI-Criminal 140 did not lower the burden of proof. Id., 387 Wis. 2d 156, ¶¶29-59.

1. It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, "until such time, if at all, as it is overcome by credible evidence" is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. Roen v. State, 182 Wis. 515, 196 N.W. 825 (1924). See also Riley v. State, 187 Wis. 156, 160, 203 N.W. 767 (1925), and Windahl v. State, 189 Wis. 424, 427, 207 N.W. 694 (1926).

2. Lipscomb v. State, 130 Wis. 238, 244, 109 N.W. 986 (1906), held it was error to refuse a requested instruction: "You are instructed that if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case acquit the defendant," where the substance of that instruction had not been covered in the general charge.

The Committee has received inquiries about the "reasonable hypothesis of innocence" provision. The Wisconsin Supreme Court clarified its meaning in State v. Poellinger, 153 Wis.2d 493, 503, 451 N.W.2d 752 (1990):

> The rule that the evidence must exclude every reasonable hypothesis of innocence does not mean that if any of the evidence brought forth at trial suggests innocence, the jury cannot find the defendant guilty. The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence. Accordingly, the rule that the evidence must exclude every reasonable hypothesis of innocence refers to the evidence that the

jury believes and relies upon to support its verdict.

3. Defining reasonable doubt as one "for which a reason can be given" was first approved in Butler v. State, 102 Wis. 364, 368 69, 78 N.W. 590, 591 92 (1899). Recent affirmations of this part of the instruction are found in State v. Cooper, 117 Wis.2d 30, 35 36, 344 N.W.2d 194 (Ct. App. 1983), and State v. Bembenek, 111 Wis.2d 617, 641 42, 331 N.W.2d 616 (Ct. App. 1983).

4. The term "the graver transactions of life" was held not to be an equivalent of the approved expression "the most important affairs of life" in McAllister v. State, 112 Wis. 496, 88 N.W. 212 (1901). This case also held that reasonable doubt should be defined as a doubt which should cause a reasonable, prudent person to pause or hesitate in the most important affairs of life rather than as "[a] doubt which would govern and control a prudent man and deter him from acting" in such affairs. 112 Wis. 496, 503, emphasis in original.

5. In 1987, the Committee revised the final sentence of the instruction by deleting the following phrase, which had come after the word "truth": ". . . and give the defendant the benefit of a reasonable doubt." The phrase was dropped because it seemed to be redundant and because the instruction seemed to read better without it.

In 2016, the Committee received several inquiries about the phrase "you are to search for the truth," some based on a recent law review article. Cecchini and White, "Truth Or Doubt? An Empirical Test Of Criminal Jury Instructions," 50 U. Richmond Law Review 1139 (2016). After careful consideration, the Committee decided not to change the text of the instruction. Challenges to including "search for the truth" in the reasonable doubt instruction have been rejected by Wisconsin appellate courts. State v. Avila, 192 Wis.2d 870, 890, 532 N.W.2d 423 (1995) (overruled on other grounds in State v. Gordon, 2003 WI 69, ¶40, 262 Wis.2d 380, 663 N.W.2d 765): "In the context of the entire instruction, we conclude that [JI 140] did not dilute the State's burden of proving guilt beyond a reasonable doubt." See also, Manna v. State, 179 Wis. 384, 399 340, 192 N.W. 160 (1923). The Wisconsin Supreme Court affirmed the use of the search for the truth language in State v. Trammell, 2019 WI 59, 387 Wis.2d 156, 928 N.W.2d 564, holding that, when read as a whole, "Wis JI-Criminal JI 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." Id., ¶¶2, 29-38, 51-59. If an addition to the text is desired, the Committee recommends the following, which is modeled on the 1962 version of Wis JI-Criminal 140:

> You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in the case.

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200 EXPERT[1] OPINION TESTIMONY: GENERAL

Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field.

In determining the weight to give to this opinion, you should consider:

- the qualifications and credibility of the witness;
- the facts upon which the opinion is based; and
- the reasons given for the opinion.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.

[CONTINUE WITH THE FOLLOWING IF EXPERTS HAVE GIVEN CONFLICTING TESTIMONY.]

[In resolving conflicts in opinion testimony, weigh the different opinions against each other. Also, consider the qualifications and credibility of the witnesses and the facts supporting their opinions.]

COMMENT

Wis JI-Criminal 200 was originally published in 1976 and revised in 1983, 1991, 2000, 2011, 2012, and 2019. The 2019 revision eliminated the use of the word "expert" in the text of the instruction. This revision was approved by the Committee in August 2023; it added to the comment.

The 2019 revision modified the text to eliminate the use of the word "expert" to describe the witness. The change was made to address the risk of "judicial vouching," a term used to describe the idea that the jury may give undue deference to the opinion of a witness whom the judge has called an "expert." The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see the report of the National Commission on Forensic Science titled

"Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

The last paragraph of this instruction includes material formerly published separately at Wis JI-Criminal 200A.

In 2011, Wisconsin adopted the so-called Daubert standard for determining the admissibility of expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). 2011 Wisconsin Act 2 renumbered § 907.02 as § 907.02(1) and amended it to read:

> 907.02(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.]

As amended, § 907.02 tracks Federal Rule of Evidence 702.

See Wis. Stat. §§ 907.02 – 907.07 and the commentary found at 59 Wis.2d R204 – R219. Also see Wis JI-Criminal 205, **EXPERT TESTIMONY – HYPOTHETICAL QUESTION**.

The key issues with regard to expert testimony are whether the witness is, in fact, qualified as an expert "by knowledge, skill, experience, training, or education" and whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." See § 907.02. If proposed testimony satisfies these criteria, it will usually be admissible and may be excluded only if it would be superfluous or a waste of time. See Judicial Council Committee's Note to § 907.02, 59 Wis.2d R207. The leading cases discussing general rules relating to expert testimony are Milbauer v. Transport Employes' Mut. Benefit Soc'y, 56 Wis.2d 860, 203 N.W.2d 135 (1973); Rabata v. Dohner, 45 Wis.2d 111, 172 N.W.2d 409 (1969); Andersen v. Andersen, 8 Wis.2d 278, 283, 99 N.W.2d 190, 193 (1959); Anderson v. Eggert, 234 Wis. 348, 361, 291 N.W. 365, 371 (1940).

Before § 907.02 was amended by 2011 Wisconsin Act 2, the criteria by which an expert's qualifications are judged were broad enough to include persons who have become an expert by virtue of experience as opposed to academic training. Whether this will continue to be the case after Act 2 is open to question. Wisconsin law referred to these persons as "lay experts":

> A lay expert is one whose expertise or special competence derives from experience working in the field of endeavor rather than from studies or diploma. Indeed, experience in some cases may be the most important element of expertise. 'Whether an opinion of a witness may be given depends upon his superior knowledge in the area in which the precise question lies.'

Black v. General Electric Co., 89 Wis.2d 195, 212, 278 N.W.2d 224 (1979).

When lay witnesses qualify as experts under these guidelines, their opinion is admissible as an expert opinion, to be treated just as the opinions of scientists, engineers, doctors, and other "true experts" are treated. In those cases, the standard instruction on expert testimony (Wis JI-Criminal 200) is appropriate, not the instruction for opinion testimony by a lay witness (see Wis JI-Criminal 201).

Examples of the types of persons recognized as "lay experts" are:

- a drug user on the identification of a substance as LSD. State v. Johnson, 54 Wis.2d 561, 564-67, 196 N.W.2d 717 (1972); and

- a foreman of a concrete construction crew on the capacity of fresh concrete to cause burns. Netzel v. State Sand & Gravel Co., 51 Wis.2d 1, 7-8, 186 N.W.2d 258 (1971).

Also see Luke v. Northwestern National Casualty Co., 31 Wis.2d 530, 535-36, 143 N.W.2d 482 (1966), and cases cited therein.

In criminal cases, considerable attention has been directed to the testimony of psychiatrists or psychologists and on testimony relating to polygraph tests. Decisions have precluded expert testimony in the following areas: polygraph tests, State v. Dean, 103 Wis.2d 228, 307 N.W.2d 628 (1981); expert opinion testimony on the defendant's capacity to form the intent to kill, Steele v. State, 97 Wis.2d 72, 294 N.W.2d 2 (1980), State v. Dalton, 98 Wis.2d 725, 298 N.W.2d 398 (1980), Muench v. Israel, 715 F.2d 1124 (7th Cir. 1983); psychiatric opinion on the appropriate degree of criminal responsibility, Roe v. State, 95 Wis.2d 226, 290 N.W.2d 291 (1980); and psychiatric testimony on the credibility of a witness, State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (1980).

The exclusion of a witness upon a party's motion under § 906.15 was previously considered discretionary. See Ramer v. State, 40 Wis.2d 79, 82–83, 161 N.W.2d 209, 210 (1968). However, this procedure is now mandatory. See Bagnowski v. Preway, Inc., 138 Wis. 2d 241, 250, 405 N.W.2d 746 (1987). If a party requests witness exclusion, the court must issue an order to exclude the specific witness or witnesses, ensuring they cannot hear the testimony given by other witnesses. See Wis. Stat. § 906.15. However, this exclusion does not apply to "a person whose presence is shown by a party to be essential to the presentation of the party's cause." Id.

It should not be assumed that one party's witness will be permitted to review the testimony of the other party's witness. If presented with a request for exclusion, the Committee recommends that the trial court make a finding as to whether it is essential for a witness to hear the testimony of another. The Committee concluded that this approach represents the best practice.

1. Although the 2019 revision removed the word "expert" from the text of the instruction (see discussion in the comment preceding this footnote), it was retained in the title so that the instruction would continue to be easy to find. The Committee recommends that the title not be included in the written instructions that are provided to the jury.

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640 MENTAL DISEASE OR DEFECT: EXPERT[1] OPINION TESTIMONY

Ordinarily, a witness may testify only about facts. However, a witness with specialized knowledge in a particular field may give an opinion in that field.

In determining the weight to give to this opinion, you should consider:

- the qualifications and credibility of the witness;
- the facts upon which the opinion is based; and
- the reasons given for the opinion.

Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.

[CONTINUE WITH THE FOLLOWING IF EXPERTS HAVE GIVEN CONFLICTING TESTIMONY.]

[In resolving conflicts in opinion testimony, weigh the different opinions against each other. Also, consider the qualifications and credibility of the witnesses and the facts supporting their opinions.]

ADD THE FOLLOWING IF AN EXPERT WHO HAS BEEN APPOINTED BY THE COURT UNDER § 971.16(2) HAS TESTIFIED

[The court has appointed (name) to examine the defendant and to testify at trial. You should weigh the testimony of (name) as you would any other opinion testimony.]

COMMENT

This instruction was originally published as "JI 640-CPC" in 1971. It was revised and republished as Wis JI-Criminal 640 in 1988, republished with an editorial change in 1990, and revised in 2003, 2011, and

2018. The 2018 revision eliminated the use of the word "expert" in the text of the instruction. This revision was approved by the Committee in December 2023; it corrected a formatting error.

Except for the last paragraph, this instruction is identical to Wis JI-Criminal 200. The last paragraph of the instruction is intended to implement § 971.16(2), which provides in part: "The fact that the physician or psychologist has been appointed by the court shall be made known to the jury, and the physician or psychologist shall be subject to cross-examination by both parties." The purpose of the appointment under this statute is to provide the court with a neutral and independent expert. See State v. Burdick, 166 Wis.2d 785, 480 N.W.2d 528 (Ct. App. 1992), below.

The 2019 revision modified the text to eliminate the use of the word "expert" to describe the witness. The change was made to address the risk of "judicial vouching," a term used to describe the idea that the jury may give undue deference to the opinion of a witness whom the judge has called an "expert." The issue was discussed in State v. Schaffhausen, an unpublished decision of the Wisconsin Court of Appeals. 2014 AP 2370, decided July 14, 2015. Also see the report of the National Commission on Forensic Science titled "Views of the Commission Regarding Judicial Vouching," May 20, 2016, which recommends that trial judges not declare a witness to be an expert in the presence of the jury or refer to a witness as an expert.

The United States Supreme Court addressed the defendant's right to a court-appointed expert in Ake v. Oklahoma, 470 U.S. 68 (1985). The court held that when a defendant's sanity at the time of the offense has been shown to be "likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance . . . if the defendant cannot otherwise afford one." Though announced in a capital case, the holding was not limited to those cases. The type of expert assistance approved was also stated broadly: "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

The interplay between the appointment of an expert under § 971.16(2) and the right to an appointed expert under the Ake decision was addressed in State v. Burdick, 166 Wis.2d 785, 480 N.W.2d 528 (Ct. App. 1992). The court affirmed the right that Ake recognized but held that § 971.16(2) "is not the statutory vehicle by which a trial court must satisfy the constitutional obligation laid down by the Ake court." 166 Wis.2d 785, 790. Rather, the statute's purpose "is to provide the court . . . with the means of obtaining 'some evidence in the case, not bought and paid for, coming from impartial witnesses who owe no duty or allegiance to either side of the controversy.'" 166 Wis.2d 785, 792, quoting Jessner v. State, 202 Wis. 184, 193, 231 N.W. 634 (1930). [Note: the Burdick decision referred to subsec. (1) of § 971.16, 1989-90 Wis. Stats. That subsection was renumbered as § 971.16(2) by 1991 Wisconsin Act 39.]

1. Although the 2019 revision removed the word "expert" from the text of the instruction (see discussion in the Comment preceding this footnote), it was retained in the title so that the instruction would continue to be easy to find. The Committee recommends that the title not be included in the written instructions that are provided to the jury.

820 [PRIVILEGE: LIMITS OF][1] SELF-DEFENSE: UNINTENDED INFLICTION OF HARM UPON THIRD PARTY CHARGED AS RECKLESS OR NEGLIGENT CRIME ENUMERATED IN § 939.48(3)[2]

INSERT THE FOLLOWING AFTER THE ELEMENTS FOR THE OFFENSE CHARGED ARE DEFINED.

Self-Defense As To (Name Person)

There is evidence in this case that the defendant was acting in self-defense as to (name person).[3] However, this does not necessarily mean that the unintended infliction of harm to (name of victim)[4] was lawful. This is because self-defense does not apply if the unintended infliction of harm amounted to the crime of (insert enumerated offense)[5].

FOR ALL OFFENSES INVOLVING [CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE], ADD THE FOLLOWING:

You should consider the evidence relating to self-defense, along with all other evidence in this case, in determining whether the defendant's conduct created an unreasonable risk of death or great bodily harm to (name of victim).

FOR FIRST DEGREE RECKLESS OFFENSES, ALSO ADD THE FOLLOWING:

You should also consider the evidence relating to self-defense, along with all other evidence in this case, in determining whether the defendant's conduct showed utter disregard for human life.

Self-Defense

Self-defense requires that:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- the defendant believed that the amount of force (he) (she) used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now.

CONCLUDE WITH THE CONCLUDING PARAGRAPHS FROM THE INSTRUCTION FOR THE OFFENSE CHARGED.[6]

COMMENT

Wis JI-Criminal 820 was originally published in 1962 and revised in 1994, 2006, 2018, and 2021. This revision was approved by the Committee in December 2023; it amended the paragraph concerning "Self-Defense As To (Name Person)."

This instruction is intended to implement § 939.48(3), which provides as follows:

> (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.

The original version of Wis JI-Criminal 820 paraphrased the statute, explaining that the privilege of self-defense extended to the unintended infliction of harm to a third party unless that infliction amounted to a crime involving what was formerly called "conduct regardless of life," reckless conduct, or criminal negligence.

It is possible that a case could involve a charge based on intentional harm to the third person – as under a statute such as § 940.19(1), simple battery, which applies to causing bodily harm with intent to cause harm to that person or another. In such a case, conduct that is privileged as to its intended target is also privileged as to the unintended third person who is injured. Such harm is "unintended," as that term is used in § 939.48(3), but it is "intentional" under the substantive statutes that define crimes in terms of intending to harm "that person or another." For that case, see Wis JI-Criminal 821, which provides that to establish the crime against the unintended victim, the State must prove beyond a reasonable doubt that the defendant was not privileged in the use of force against the intended target of that force.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant needs only to produce "**some evidence**" in support of the privilege of self-defense. Stietz, supra, at ¶16 (emphasis added). See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution, facts elicited from prosecution witnesses by defense cross-examination, or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although

Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 939.48(3) addresses the privilege of self-defense as to the intentional infliction of harm upon a real or apparent wrongdoer and the unintended infliction of harm upon a third person. However, this instruction provides that the extension of self-defense does not apply to offenses amounting to the crimes of first-degree or second-degree reckless homicide, homicide by negligent handling of dangerous weapons, explosives, or fire, first-degree or second-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire.

The bracketed language "privilege: limits of" is optional and can be omitted if the trial judge believes it will confuse the jury. Confusion may arise when the charged offense is one of the enumerated offenses listed under § 939.48(3) and the right to self-defense is not applicable to the victim.

2. The privilege of self-defense, as outlined in § 939.48(3), extends to the unintentional infliction of harm on a third party, except when such harm amounts to any of the following crimes:

- first-degree reckless homicide
- second-degree reckless homicide
- homicide by negligent handling of dangerous weapon, explosives or fire
- first-degree reckless injury
- second-degree reckless injury
- injury by negligent handling of dangerous weapon, explosives or fire

Whether the unintended harm caused by the defendant amounts to one of the enumerated crimes depends on the reasonableness of the defendant's conduct and whether it constituted a significant level of recklessness or negligence.

Therefore, when a defendant is charged with an offense listed in § 939.48(3), and the finder of fact concludes that the defendant's actions created an unreasonable risk of death or great bodily harm to the victim, satisfying the recklessness or negligence element, the resulting harm amounts to the enumerated crime and the State is not obligated to prove that the defendant acted unlawfully in self-defense.

3. Here, use the name of the person against whom the defendant intended to use force in self-defense.

4. Insert the name of the injured party, who is the victim of the crime charged.

5. Here, insert one of the following offenses provided in § 939.48(3):

- first-degree reckless homicide
- second-degree reckless homicide

- homicide by negligent handling of dangerous weapon, explosives or fire
- first-degree reckless injury
- 2nd-degree reckless injury
- injury by negligent handling of dangerous weapon, explosives or fire

§ 939.48(3) addresses reckless or negligent offenses that result in the "unintended infliction of harm." As a result, the offenses of first and second degree recklessly endangering safety, which concern the "risk" of harm rather than the "unintended infliction of harm," are not covered under this section.

6. In cases where the offense charged falls under the specific crimes listed in Section 939.48(3) and it is determined that the defendant's actions created an unreasonable risk of death or great bodily harm to the victim, the State is not required to prove that the defendant acted unlawfully in self-defense.

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820 EXAMPLE: [PRIVILEGE: LIMITS OF] SELF DEFENSE: UNINTENDED INFLICTION OF HARM UPON THIRD PARTY CHARGED AS RECKLESS OR NEGLIGENT CRIME ENUMERATED IN 939.48(3)

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.

State's Burden Of Proof

Before you may find the defendant guilty of first degree reckless homicide, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused the death of (name of victim).

   "Cause" means that the defendant's act was a substantial factor in producing the death.

2. The defendant caused the death by criminally reckless conduct.

   "Criminally reckless conduct" means:

   - the conduct created a risk of death or great bodily harm to another person; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant was aware that her conduct created the unreasonable and

substantial risk of death or great bodily harm.

3. The circumstances of the defendant's conduct showed utter disregard for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.

Self-Defense As To (Name Person)

There is evidence in this case that the defendant was acting in self-defense as to (name of person). However, this does not necessarily mean that the unintended infliction of harm to (name of victim) was lawful. This is because self-defense does not apply if the unintended infliction of harm amounted to the crime of first degree reckless homicide.

You should consider the evidence relating to self-defense, along with all other evidence in this case, in determining whether the defendant's conduct created an unreasonable risk of death or great bodily harm to (name of victim). You should also consider the evidence relating to self-defense, along with all other evidence in this case, in determining whether the defendant's conduct showed utter disregard for human life.

Self-Defense

Self-defense requires that:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- the defendant believed that the amount of force they used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use force that is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of her acts and not from the viewpoint of the jury now.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 820 EXAMPLE was approved by the Committee in December 2023.

The instruction is drafted as an example of how Wisconsin Jury Instruction-Criminal 820 would be applied in a scenario where the underlying offense is first-degree reckless homicide, as specified in Section 940.02(1).

870 PRIVILEGE: CONDUCT IN GOOD FAITH AND IN AN APPARENTLY AUTHORIZED AND REASONABLE FULFILLMENT OF DUTIES OF A PUBLIC OFFICE — § 939.45(3)

[INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.]

Privilege Of A Public Office

The privilege of fulfillment of the duties of a public office is an issue in this case. The law provides that a person is privileged to engage in conduct that would otherwise be criminal if:

- First, the defendant acted in good faith.

"Good faith" means that the defendant believed that (his) (her) conduct was an authorized and reasonable fulfillment of (his) (her) duties as a (specify the public office).[1]

- Second, the defendant's conduct was an apparently authorized and reasonable fulfillment of the duties of a public office.

  The duties of a (specify the public office) include: (specify duties).[2]

"Apparently authorized" means that a reasonable person would believe that the defendant had the authority to act in the manner (he) (she) did.

"Reasonable fulfillment" of duties means that the defendant's conduct was necessary and proportional in responding to the interests at stake.[3]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully within the scope of the privilege of a public office.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _____ elements of _____[4]

have been proved and that the defendant did not act lawfully within the scope of the privilege of fulfillment of the duties of a public office, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 870 was approved by the Committee in April 2014. This revision was approved by the Committee in August 2023; it corrected formatting errors.

This instruction is drafted for the privilege set forth in § 939.45(3).

The privilege has been discussed in two published appellate decisions. State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986) involved a district director for a state technical institute charged with violating § 946.13(1)(b), private interest in a public contract. State v. Trentadue, 180 Wis.2d 670, 510 N.W.2d 727 (Ct. App. 1993), involved a police officer charged with violating § 941.20(1)(c), intentionally pointing a firearm at or toward another.

1. The Committee concluded that the standard for "good faith" was a subjective one – the focus should be on whether the defendant actually believed that what he or she was doing was an authorized and reasonable fulfillment of the duties of his or her office.

2. The duties of some public offices are set forth in the Wisconsin Statutes or Administrative Code or may be established by reference to other legal standards. When that is the case, the Committee suggests using the sentence in parentheses and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

3. This is based on the following from the Wisconsin Supreme Court decision in State v. Stoehr, 134 Wis.2d 66, 86, 396 N.W.2d 177 (1986):

> The statutory privilege defense is designed to provide a justification for conduct which "must be in accord with the actor's function as a public servant, and must be necessary and proportional to the protection and furtherance of the interests at stake." 2 Robinson, *Criminal Law Defenses*, sec. 149(a), p. 216 (1984).

4. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: ". . . that all four elements of battery have been proved . . ." See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use "this offense"

instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: "that both elements of this offense were proved, . . ." See Wis JI-Criminal 1222A.

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OFFICE OF JUDICIAL EDUCATION
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CRIMINAL

VOLUME II

Wisconsin Criminal Jury Instructions Committee

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1021 FIRST DEGREE RECKLESS HOMICIDE — 940.02(2)[1]

Statutory Definition of the Crime

First degree reckless homicide, as defined in § 940.02(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by delivery[2] of a controlled substance in violation of § 961.41, which another human being uses and dies as a result of that use.[3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following five elements[4] were present.

Elements of the Crime that the State Must Prove

1. The defendant delivered[5] a substance.

   "Deliver" means to transfer something from one person to another.[6]

2. The substance was by itself or contained (name controlled substance).[7]

   [(Name statutorily listed controlled substance) is a controlled substance, the delivery of which is prohibited by law.]

3. The defendant knew or believed that the substance was by itself or contained [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][8]

You cannot look into a person's mind to determine knowledge or belief. You may determine knowledge or belief directly or indirectly from all the evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate state of mind. You may find knowledge or belief from such conduct or statements, but you are not required to do so.

4. (Name of victim) used the substance alleged to have been delivered by the defendant.

5. (Name of victim) died as a result of the use of that substance.

This requires that the use of the controlled substance was a substantial factor in causing the death.[9]

[A substantial factor need not be the sole or primary factor causing death.][10]

[There may be more than one cause of death. The use of one substance may produce it, or the use of two or more substances might jointly produce it.][11]

IF THE SUBSTANCE ALLEGED TO HAVE BEEN DELIVERED BY THE DEFENDANT IS A COMPOUND, MIXTURE, DILUENT, OR OTHER SUBSTANCE MIXED OR COMBINED WITH A CONTROLLED SUBSTANCE, ADD THE FOLLOWING:

[Whether the substance is a (controlled substance) (controlled substance analog) by itself, or a mixture or combination of a (controlled substance) (controlled substance analog) with any compound, mixture, diluent or other substance is not relevant as long as (name of victim) died as a result of using the substance.][12]

IF DELIVERY BY MORE THAN ONE PERSON IS INVOLVED, ADD THE FOLLOWING:[13]

[It is not required that the defendant delivered the substance directly to (name of victim). If possession of the substance was transferred more than once before it was used by (name of victim), each person who transferred possession of that substance has delivered it.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance), that the defendant knew that the substance was by itself or contained [(name controlled substance)] [a controlled substance],[14] that (name of victim) used the substance delivered by the defendant, and that (name of victim) died as a result of that use, you should find the defendant guilty of first degree reckless homicide.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1021 was originally published in 1989 and revised in 1992, 1998, 2006, 2009, 2011, and 2022. The 2022 revision amended language in element 5 to clarify the meaning of "substantial factor" as the term pertains to causation, as well as mixed or combined substances. This revision was approved by the Committee in December 2023; it added to the comment.

The 1997 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the controlled substance statutes from Chapter 161 to Chapter 961;
(2) adding "distributing" to the conduct prohibited by § 940.02(2); and
(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing. . . ." For offenses involving "manufacture," see Wis JI-Criminal 6021 and use the first and second elements of that instruction in place of the first element provided here. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6005, which provides the definition of the term, and Wis JI-Criminal 6020A, which illustrates how an instruction must be modified to employ the "analog" alternative.

Possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991). In Clemons, the court held that the strict statutory elements test for lesser included offenses was not satisfied: one can "deliver" without "possessing," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512.

Charging a defendant with violating § 940.02(2) and with contributing to the delinquency of a child resulting in death under § 948.40(4)(a) is not multiplicitous. The offenses each require proof of a fact that the other does not, and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

A defendant who intentionally assists another person in purchasing a controlled substance may be liable as an aider and abettor to reckless homicide as defined in § 940.02(2)(a) if the buyer dies as a result of using the substance. State v. Hibbard, 2022 WI App 53, 404 Wis. 2d 668, 982 N.W.2d 105. Hibbard rejected the defendant's claim that the interplay of §§ 939.05 and 940.02(2)(a) rendered the statutes unconstitutionally vague by not providing sufficient notice that his conduct could make him liable for the death caused by the drugs delivered by the dealer. The court held the statutes inform persons that assisting another in the delivery of a controlled substance exposes the actor to liability for reckless homicide if the person who assists in completing the delivery (1) knows the person making the actual delivery is committing a crime or intends to do so, and (2) intends their conduct to assist in the commission of the crime. "As applied here, the statutes informed Hibbard that, because he knew [the dealer] intended to sell heroin to [the decedent], anything he did to facilitate that sale with the intent that the sale occur could subject him to liability for a homicide resulting from a person's use of the drugs that were sold." 404 Wis. 2d 668, ¶32.

1. Section 940.02(2) defines a crime denominated "first degree reckless homicide," which applies to causing death by furnishing controlled substances. This offense was not part of the original homicide revision bill but was created by separate legislation referred to at the time as the "Len Bias Law." (See 1987 Wisconsin Act 339.) It was reenacted as part of the homicide revision.

2. This instruction is drafted for "delivery" of a controlled substance. For a case involving "manufacture," see Wis JI-Criminal 6021 and use the first and second elements of that instruction in place of the first element provided here. Also, see the discussion of "distribute" above in the comment preceding note 1.

3. This statement of the offense is essentially the same as the one found in § 940.02(2)(a). A different variation is found in subsection (2)(b), which applies where the defendant causes death by "administering or assisting in administering" a controlled substance.

The balance of the instruction recasts the statutory statement of the offense by first establishing the requirements for a delivery in violation of § 961.41 and then adding the requirement that the victim dies as a result of using the substance so delivered.

4. The first three elements are based on those required for delivery of a controlled substance under § 961.41(1). See Wis JI-Criminal 6020. The fourth element uses the language of § 940.02(2)(a).

5. See note 2, supra.

6. This definition was adopted from that found in § 961.01(6), which reads as follows:

"Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

The statute applies where the controlled substance is diluted after delivery and to each person who transfers the substance. Section 940.02(2)(a) provides that "[t]his paragraph applies:

> . . . .
>
> 2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.
>
> 3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph."

7. Section 940.02(2) applies to controlled substances listed in Schedule I or II, which are listed in §§ 961.14 and 961.16, respectively. The statute also applies to delivery of "a controlled substance analog of a controlled substance included in Schedule I or II or of ketamine or flunitrazepam." See 940.02(2)(a). The instruction has been drafted to provide for the insertion of the specific name of the substance. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the alleged substance tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the alleged substance tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," *not* that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

Whether the defendant actually delivered the substance remains a question for the jury (see the first element).

8. For offenses under § 961.41, the defendant must know that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they know the substance is a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

It is sometimes a problem in controlled substance cases that the substance is known by its street name rather than by its proper scientific or chemical name. In such a case, Wis JI-Criminal 6020 recommends adding the following:

> This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance), and that the defendant knew or believed the substance he is alleged to have delivered was (street name), you may find that he knew or believed the substance was a controlled substance.

9. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.
> See note 9, supra.

Section 940.02(2) states the causal requirement in two different ways. It requires that the defendant "cause the death of another human being" by, for example, manufacture of a controlled substance which a person uses "and dies as a result of that use." The statute is one of several criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court construed "results in" as used in § 346.17(3).

The court held that the statute was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that the defendant's conduct was a substantial factor in causing the death. The court noted that more than but-for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

10. Several cases have addressed the definition of "substantial factor." In the context of felony murder, the Wisconsin Supreme Court has held that a "'substantial factor' need not be the sole cause of death." See State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). In State v. Owen, 202 Wis.2d 620, 631, 551 N.W.2d 50, (Ct. App. 1996), the court concluded, "A substantial factor need not be the sole or primary factor causing the great bodily harm."

In State v. Miller, 231 Wis.2d 447, 457, 605 N.W.2d 567 (1999) the court determined that the Oimen and Owen holdings are not inconsistent with each other. The Miller court noted, "Both cases use a definite article in explaining that a substantial factor need not be limited to one sole or primary cause" . . . "[O]ur reading of Oimen and Owen convinces us that a substantial factor contemplates not only the immediate or primary cause, but other significant factors that lead to the ultimate result." Id., at 457.

In Burrage v. United States, 571 U.S. 204, 134 S.Ct. 881 (2014), the U.S. Supreme Court interpreted a federal statute – 21 USC § 844(a)(1), (b)(1)A-C – which provides for a 20-year mandatory minimum sentence where death or great bodily harm results from the use of a controlled substance. The Court held that "results from" means "actual cause" and that "actual cause" means that the harm would not have occurred but-for the defendant's conduct. The Court rejected the government's argument [a position also adopted by several federal circuits] that it was sufficient if the defendant's conduct was a "contributing cause" of the harm. In rejecting that argument, the court referred to [but did not necessarily accept] the government's characterization that "contributing cause" and "substantial factor" cause were the same thing. That reference should have no impact on Wisconsin law because Burrage is a decision interpreting a federal criminal statute and is not binding in Wisconsin. Further, the Wisconsin "substantial factor" test requires "actual" or "physical" cause [and thus would satisfy the concerns addressed in Burrage if that decision did apply].

11. See note 10, supra. The bracketed language is an adaptation of language provided in Wis JI-Criminal 901 concerning cases where there is evidence of more than one cause.

12. See note 9, supra.

13. The paragraph in brackets is intended to explain the rule stated in § 940.02(2)(a):

> (a) This paragraph applies:
>
> . . .
>
> 3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance . . . is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of s. 961.41 is guilty under this paragraph.

Because of this rule—referred to as the "chain of delivery" method of proof—a trial on a charge under § 940.02(2)(a) may involve evidence of multiple transfers of a controlled substance by multiple persons. In addition, if the charge is coupled with charges of deliveries of a controlled substance in violation of § 961.41 that did not cause death, the trial will include evidence of those deliveries. In such cases, the court must take care to instruct the jury only on the method (or methods) of proof of the § 940.02(2)(a) charge that is sufficiently supported by trial evidence. See State v. Harvey, 2022 WI App 60, 405 Wis. 2d 322, 983 N.W.2d 700 (it was error to instruct the jury on chain of delivery and aiding-and-abetting methods of proof because those methods of proof were not supported by sufficient evidence; however, the error did not require a new trial because the jury was also instructed on the direct delivery method and there was sufficient evidence the defendant directly delivered the controlled substance to the victim).

14. See note 8, supra.

1030 FELONY MURDER: UNDERLYING CRIME COMPLETED — § 940.03

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing the crime of (name of crime).[1]

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant committed the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).[2]

Determining Whether the Defendant Committed (name of crime)

The first element of felony murder requires that the defendant committed the crime of (name of crime).

(Name of crime), as defined in section _____[3] of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).[4]

Determining Whether Death was Caused by the Commission of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).

The Meaning of "Cause"

"Cause" means that the commission of the (name of crime) was a substantial factor in producing the death.[5]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A CRIME.[6]

[The phrase "the commission of" the crime includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name of crime) and that the death of (name of victim) was caused by the commission of the (name of crime), you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1030 was originally published in 1989 and revised in 1994, 1998, 2003, 2007, 2013, and 2022. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. The 2022 revision reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022]. This revision was approved by the Committee in October 2023; it added

to the comment.

This instruction is for a felony murder case based on the complete commission of the underlying crime. For cases involving an attempt to commit the underlying crime, see Wis JI-Criminal 1031. For cases based on committing the crime as a party to the crime, see Wis JI-Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

This instruction is for a violation of § 940.03, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally and of the offense covered by this instruction, see "The Importance of Clarity in the Law of Homicide: The Wisconsin Revision," by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as a separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining "third degree murder." The current statute is essentially the same as the statute in Carlson, except it is limited to

designated felonies. Carlson held that "the correct procedure" would be:

> in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
> 5 Wis.2d 595, 608 09.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: ". . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of "attempted felony murder," meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gunpoint. They forced her to the floor, placed a pillow over her head, and Briggs's companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as a party to the crimes of attempted first degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, "is not reconcilable with the concept of attempt."

1. As amended by 2021 Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery

- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

2. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states that have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute, as revised in 1989, addressed that problem by specifying a limited number of felonies – 5 – that could be predicates for felony murder. One felony was added by 2001 Wisconsin Act 109 – s. 943.23(1g). Seven crimes were added by 2005 Wisconsin Act 313. One more felony was added by 2021 Wisconsin Act 209 – s. 940.204. Thus, at least with the original limited list of predicate felonies, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the

crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Aggravated Burglary – Wis JI-Criminal 1422, 1425A, 1425B, 1425C, 1425E
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court

concluded "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit', encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary, which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

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1031 FELONY MURDER: UNDERLYING CRIME ATTEMPTED — § 940.03

Statutory Definition of the Crime

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while attempting to commit the crime of (name of crime).[1]

State's Burden of Proof

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

Elements of Felony Murder That the State Must Prove

1. The defendant attempted to commit the crime of (name of crime).
2. The death of (name of victim) was caused by the attempt to commit (name of crime).[2]

Determining Whether the Defendant Attempted to Commit (name of crime)

The first element of felony murder requires that the defendant attempted to commit the crime of (name of crime).

The crime of attempted (name of crime), as defined in § 939.32 and §_____[3] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name of crime), does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the

crime except for the intervention of another person or some other extraneous factor.[4]

First, consider whether the defendant intended to commit (name of crime).

(Name of crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[5]

The crime involved in this case, however, is not (name of crime) as defined, but an attempt to commit the crime of (name of crime).

Next, consider whether the defendant did acts toward the commission of the crime of (name of crime) that demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name of crime) except for the intervention of another person or some other extraneous factor.

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Determining Whether Death was Caused by the Attempt to Commit of (name of crime)

The second element of felony murder requires that the death of (name of victim) was caused by the attempt to commit (name of crime).

The Meaning of "Cause"

"Cause" means that the attempt to commit (name of crime) was a substantial factor in producing the death.[6]

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM AN ATTEMPTED FELONY.[7]

[The phrase "the attempt to commit" the crime includes the period of immediate flight from that crime.]

Jury's Decision on Felony Murder

If you are satisfied beyond a reasonable doubt that the defendant attempted to commit the crime of (name of crime) and that the death of (name of victim) was caused by the attempt to commit (name of crime), you should find the defendant guilty of felony murder. If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1031 was originally published in 2003 and revised in 2007, 2013, and 2022. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. The 2022 revision reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022]. This revision was approved by the Committee in October 2023; it added to the comment.

This instruction is for a felony murder case based on the attempt to commit the underlying felony. For cases involving the complete commission of the underlying felony, see Wis JI-Criminal 1030. For cases based on committing the felony as a party to the crime, see Wis JI-Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20 Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- §940.204 Battery or threat to health care providers and staff

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that the offenses added by Act 313 include two offenses that define misdemeanor offenses: § 940.19(1) and § 940.195(1). It is not clear whether the application of the revised felony murder statute was intended to be based on the commission of a misdemeanor. Wisconsin had misdemeanor manslaughter statutes until the Criminal Code was revised in 1955. See, for example, § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new "unclassified felony" under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as a separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining "third

degree murder." The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that "the correct procedure" would be:

> in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.
> 5 Wis.2d 595, 608 9.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: ". . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI-Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App., 1998), the court held that there is no crime of "attempted felony murder," meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gunpoint. They forced her to the floor, placed a pillow over her head, and Briggs's companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as a party to the crimes of attempted first degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d 681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, "is not reconcilable with the concept of attempt."

1. As amended by Wisconsin Act 209, § 940.03 specifies fourteen statutes defining crimes that can be the basis for a felony murder charge. The fourteen crimes are:

- § 940.19 Battery
- § 940.195 Battery to an unborn child
- § 940.20. Battery: special circumstances
- § 940.201 Battery or threat to witness
- § 940.203 Battery or threat to judge
- § 940.204 Battery or threat to health care providers and staff
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) "Carjacking"
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

(a) without consent and causing pregnancy or great bodily harm
(b) without consent by use or threat of a dangerous weapon or article
(c) without consent, while aided and abetted and by use or threat of force.

2. "While committing or attempting to commit" is the phrase used by § 940.03 to identify the connection between the underlying felony and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the felony, and the commission of the felony caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77. For a charge based on an attempted felony, the statement is modified to refer to death being caused by the attempt to commit the felony.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused "as a natural and probable consequence of the commission of or attempt to commit a felony." The nature of the connection between the felony and the death has been a source of considerable difficulty in many states that have felony murder statutes. See the Introductory Comment at Wis JI-Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the felony has been the result of the wide range of felonies to which the felony murder rule could apply. Wisconsin's statute addresses that problem by specifying a limited number of felonies. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those felonies, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the felony was committed. Since § 940.03 specifically includes attempts to commit the named felonies, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the felon while fleeing the scene of the

crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a felony (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the felony (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the felony and deaths caused after the felony is committed are best resolved by asking: Did the commission of the felony cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. This statement and the material immediately following are based on Wis JI-Criminal 580, Attempt. See the Comment and footnotes for that instruction for an explanation of the issues relating to defining attempt.

5. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.19 Battery – Wis JI-Criminal 1220-1226
- for § 940.195 Battery to an unborn child – Wis JI-Criminal 1227
- for § 940.20 Battery: special circumstances – Wis JI-Criminal 1228-1237
- for § 940.201 Battery or threat to witness – Wis JI-Criminal 1238
- for § 940.203 Battery or threat to judge – Wis JI-Criminal 1248
- for § 904.204(2) Battery or threat to a staff member of a health care facility – Wis JI-Criminal 1247A
- for § 904.204(3) Battery or threat to a health care provider – Wis JI-Criminal 1247B
- for § 940.225(1) First Degree Sexual Assault – Wis JI-Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI-Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI-Criminal 1275
- for § 940.31 Kidnapping – Wis JI-Criminal 1280-1282
- for § 943.02 Arson – Wis JI-Criminal 1404, 1405
- for § 943.10(2) Aggravated Burglary – Wis JI-Criminal 1422, 1425A, 1425B, 1425C, 1425E
- for § 943.23(1g) "Carjacking" – Wis JI-Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI-Criminal 1480, 1480A

If an attempt to commit one of these felonies is the basis for the charge, Wis JI-Criminal 1031 provides a model.

6. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

7. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded: "as a matter of law that the phrase in § 940.03, 'while committing or attempting to commit,' encompasses the immediate flight from a felony." The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the "mastermind" of an armed burglary, which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

1185A VIOLATIONS OF § 940.09 AND § 940.25 INVOLVING AN UNBORN CHILD

FOR VIOLATIONS OF § 940.09 AND § 940.25 WHERE THE VICTIM WAS AN UNBORN CHILD, MAKE THE FOLLOWING CHANGES IN THE APPLICABLE INSTRUCTION.

- In the opening paragraph, substitute "unborn child" for "another."

- Revise element 2. to read as follows:

2. The defendant's operation of a vehicle caused [the death of] [great bodily harm to] an unborn child.

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.

OR

2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of an unborn child.

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.

COMMENT

Wis JI-Criminal 1185A was originally published in 1999 and revised in 2004. This revision was approved by the Committee in December 2023; it added the alternative language concerning the defendant's operation or handling of a firearm or airgun causing the death of an unborn child as provided in § 940.09.

The 2004 revision of this instruction changed it to provide suggested changes in the uniform instructions for violations of §§ 940.09 and 940.25 involving causing the death of or great bodily harm to an unborn child. Those instructions are:

JI 1185	HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE – § 940.09(1)(a)
JI 1186	HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.09(1)(b)
JI 1186A	HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.02 GRAMS OR MORE – § 940.09(1)(b)

JI 1189	HOMICIDE BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE/HOMICIDE BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.09(1)(a) and § 940.09(1)(b)
JI 1190	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM WHILE UNDER THE INFLUENCE – § 940.09(1g)(a)
JI 1191	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.09(1g)(b)
JI 1192	HOMICIDE BY OPERATION OR HANDLING OF A FIREARM OR HANDGUN WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE – § 940.09(1g)(am)
JI 1262	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WHILE UNDER THE INFLUENCE – § 940.25(1)(a)
JI 1263	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.08 GRAMS OR MORE – § 940.25(1)(b)
JI 1263A	INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION – 0.02 GRAMS OR MORE – § 940.25(1)(b)

The definition of "unborn child" is the one provided in § 939.75.

1187 HOMICIDE BY OPERATION OF A VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 940.09(1)(am)

Statutory Definition of the Crime

Section 940.09(1)(am) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[1] a vehicle.[2]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[3]

2. The defendant's operation of a vehicle caused the death of (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[4] in producing the death.

3. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant operated a vehicle.

   (Name restricted controlled substance) is a restricted controlled substance.[5]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.[6]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[7]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[8] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[9] that this defense is established.

"By the greater weight of the evidence" means evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[10]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[11] does not by itself

provide a defense to the crime charged against the defendant.[12] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[13]]

COMMENT

Wis JI Criminal 1187 was originally published in 2007 and revised in 2010, 2019, and 2021. The 2019 revision added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31. The 2021 revision added an alternative element to the instruction and modified footnotes 5 and 6 to incorporate changes made by the 2019 Wisconsin Act 68. This revision was approve by the Committee in December 2023; it added to the comment.

This instruction is drafted for violations of § 940.09(1)(am), causing death while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act's effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI-Criminal 2600 Introductory Comment, Sec. IX.

This instruction may be useful as a model for violations of § 346.63(2)(a)3., which addresses causing great bodily harm and causing injury by operating with a detectable amount of a restricted controlled substance. There is no uniform instruction for this offense.

Violations of § 940.09 are Class D felonies unless "the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2)." The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change, but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds "a compelling reason and places its reason on the record." [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the Department of Transportation or sentencing court.]

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The statute applies to the "operation or handling" of a vehicle. The instruction uses "operates" throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

2. Section 939.22(44) defines "vehicle" as follows:

> "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.

3. Regarding the definition of "operate," see Wis JI Criminal 2600 Introductory Comment, Sec. III.

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

> There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 8 below. The defense is closely related to the cause element but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of death as required by the second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been operating

"with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

5. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta 9 tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

6. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is

admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

7. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

See Wis JI Criminal 2600 Introductory Comment, Sec. X.

8. See note 7, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

9. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

10. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

11. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09,

940.25, and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

12. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

13. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved because the defense has been established.

1190 HOMICIDE BY OPERATION OR HANDLING OF FIREARM OR AIRGUN WHILE UNDER THE INFLUENCE — § 940.09(1g)(a)

Statutory Definition of the Crime

Section 940.09(1g)(a) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the (operation) (handling) of (a firearm) (an airgun) while under the influence of an intoxicant.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(operated) (handled)] [(a firearm)[2] (an airgun)[3]].
2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of (name of victim).

   "Cause" means that the defendant's (operation) (handling) of the (firearm) (airgun) was a substantial factor[4] in producing the death.
3. The defendant was under the influence of an intoxicant at the time the defendant (operated) (handled) the (firearm) (airgun).

Definition of "Under the Influence of an Intoxicant"

"Under the influence of an intoxicant" means that the defendant's ability to [(operate)

(handle)] [(a firearm) (an airgun)] was materially impaired because of consumption of an alcoholic beverage.[5]

Not every person who has consumed alcoholic beverages is "under the influence," as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to [(operate) (handle)] [(a firearm) (an airgun)].

It is not required that impaired ability to (operate) (handle) be demonstrated by particular unsafe acts. What is required is that the person's ability to safely (operate) (handle) the (firearm) (airgun) be materially impaired.

How to Use the Test Result Evidence

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of an incident is evidence of the defendant's alcohol concentration at the time of the incident.[6]

WHERE TEST RESULTS SHOWING MORE THAN 0.04 BUT LESS THAN 0.08 GRAMS HAVE BEEN ADMITTED, THE EVIDENCE IS RELEVANT BUT DOES NOT HAVE PRIMA FACIE EFFECT. SEE WIS JI-CRIMINAL 232.[7]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED,[8] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[9] THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210

liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged incident, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant was under the influence of an intoxicant at the time of the alleged incident unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[10]

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[11]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[12] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[13] that this defense is established.

"By the greater weight of the evidence" [is meant] [means] evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[14]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[15] does not by itself provide a defense to the crime charged against the defendant.[16] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not been under the influence of an intoxicant and had been exercising due care.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[17]]

COMMENT

Wis JI-Criminal 1190 was originally published in 1962 and revised in 1980, 1982, 1985, 1986, 1993, 2004, 2006, and 2014. This revision was approved by the Committee in December 2023; it added to the comment.

This instruction is drafted for violations of § 940.09(1g)(a), causing death while handling a firearm or airgun under the influence an intoxicant. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A, which identifies the changes that should be made in the instructions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

See Wis JI-Criminal 1191 for the related offense involving an alcohol concentration of 0.08 or more of .08 or more. For cases with two charges under the influence and an alcohol concentration of 0.08 or more Wis JI-Criminal 1189 can be used as a model.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 13 and following. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

The 2004 revision adopted a new format for footnotes. Although this offense involves firearms or airguns, the structure of the statute and its terms are the same as apply to motor vehicle offenses. Footnotes common to motor vehicle offenses are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. This instruction is drafted for cases involving the influence of an intoxicant, which is defined to include "an alcohol beverage, hazardous inhalant, . . . a controlled substance or controlled substance analog under ch. 961, . . . any combination of an alcohol beverage, hazardous inhalant, controlled substance and controlled substance analog, or . . . any other drug, or . . . an alcohol beverage and any other drug." See § 939.22(42) in note 6 below. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

2. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

3. "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas. See § 939.22(2).

4. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 12 below.

5. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to Motor Vehicle Code offenses involving the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to Motor Vehicle Code offenses involving the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. The definition in the instruction paraphrases the full definition provided in § 939.22(42):

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

Note: "hazardous inhalant" was added to the definition in § 939.22(42) by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013]. Act 83 also created a definition of "hazardous inhalant" in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a "hazardous inhalant," see Wis JI-Criminal 2667.

For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

6. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So, there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

7. It may be that cases will be charged under § 940.09(1g)(a) where a test has shown an alcohol concentration of more than 0.04 grams but less than 0.08 grams. Section 885.235(1)(b) provides that a test result in this range "is relevant evidence on intoxication . . . but is not to be given any prima facie effect." Wis JI-Criminal 232 provides an instruction that can be adapted for this situation.

8. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

9. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

10. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

11. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

12. See note 12, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

13. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence" because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

14. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

15. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25, and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

16. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction

be drafted. See note 15, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

17. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

> 1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
>
> 2) not guilty even though the elements have been proved because the defense has been established.

1192 HOMICIDE BY OPERATION OR HANDLING OF A FIREARM OR AIRGUN WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE – § 940.09(1g)(am)

Statutory Definition of the Crime

Section 940.09(1g)(am) of the Criminal Code of Wisconsin is violated by a person who causes the death of another by the (operation) (handling) of (a firearm) (an airgun) while the person has a detectable amount of a restricted controlled substance in his or her blood.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [(operated) (handled)] [(a firearm)[1] (an airgun)[2]].

2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of (name of victim).

   "Cause" means that the defendant's (operation) (handling) of the (firearm) (airgun) was a substantial factor[3] in producing the death.

3. At the time the defendant (operated) (handled) the (firearm) (airgun), there was a detectable amount of a restricted controlled substance in the defendant's blood.

   (Name restricted controlled substance) is a restricted controlled substance.[4]

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta 9 tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

How to Use the Test Result Evidence

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (operating) (handling).[5]

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the (operating) (handling), but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged (operating) (handling) unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:[6]

[Jury's Decision]

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),[7] USE THE FOLLOWING:

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in (his) (her) blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence[8] that this defense is established.

"By the greater weight of the evidence" means evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.[9]

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care[10] does not by itself provide a defense to the crime charged against the defendant.[11] Consider evidence of the

conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in (his) (her) blood.]

Jury's Decision

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.[12]]

Comment

This instruction was approved by the Committee in December 2023.

This instruction is drafted for violations of § 940.09(1g)(am), causing death while handling a firearm or airgun with a detectable amount of a restricted controlled substance. For cases involving the death of an unborn child, see Wis JI-Criminal 1185A, which identifies the changes that should be made in the instructions.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 4 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

1. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

2. "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas. See § 939.22(2).

3. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 6 below.

4. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 967.055(1m)(b) defines "restricted controlled substance" as follows:

> (b) "Restricted controlled substance" means any of the following:
>
> 1. A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
> 2. A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in subd. 1.
> 3. Cocaine or any of its metabolites.
> 4. Methamphetamine.
> 5. Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

5. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

> 885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that

> the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9- tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

> [t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of operating or handling;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of operating or handling.

As to the second difference – admissibility – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence" strongly implies that the analysis is admissible. As to the third difference – connection with the time of operating or handing – the Committee concluded that the statement "the court shall treat the analysis as prima facie evidence on the issue of the person having . . ." may express a legislative intent that the analysis be admissible to prove the material issue "that a person had a detectable amount of a restricted controlled substance in his or her blood while handing a firearm . . ." as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the "prima facie" effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

6. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.

7. See note 4, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

8. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

9. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that

an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

10. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25, and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

11. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 10, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

12. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and

2) not guilty even though the elements have been proved because the defense has been established.

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1193 MUTILATING A CORPSE — § 940.11(1)

Statutory Definition of the Crime

Section 940.11(1)[1] of the Criminal Code of Wisconsin is violated by one who mutilates, disfigures, or dismembers a corpse with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (mutilated) (disfigured) (dismembered) a corpse.[2]
2. The defendant (mutilated) (disfigured) (dismembered) a corpse with the intent to [conceal a crime] [avoid apprehension, prosecution, or conviction[3] for a crime].

   This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime].[4]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1193 was originally published in 1998 and revised in 2006. This revision was approved by the Committee in August 2023; it added to the comment.

This instruction is for violations of sub. (1) of § 940.11. For violations of sub. (2) of the same statute, see Wis JI-Criminal 1194.

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and §946.47 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring Or Aiding Felons.

Per the provisions of Wis. Stat. § 939.66: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both." Further, subsection (7) of the statute states that an included crime could be "the crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)." Therefore, a guilty verdict can be rendered for both a count of mutilating a corpse and a count of hiding or burying a corpse, but only one judgment of conviction can be entered for each corpse.

1. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

2. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction) or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

3. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

1194 HIDING OR BURYING A CORPSE — § 940.11(2)

Statutory Definition of the Crime

Section 940.11(2)[1] of the Criminal Code of Wisconsin is violated by one who hides or buries a corpse [with intent to conceal a crime or avoid apprehension, prosecution, or conviction for a crime] [with intent to collect benefits under section (49.141) (49.49) (49.795)].[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (hid)[3] (buried) a corpse.[4]
2. The defendant (hid) (buried) a corpse with intent to [conceal a crime] [avoid apprehension, prosecution, or conviction[5] for a crime] [to collect benefits under section (49.141) (49.49) (49.795)].

   This requires that the defendant acted with the purpose to [conceal a crime] [avoid apprehension, prosecution, or conviction for a crime] [to collect benefits under section (49.141) (49.49) (49.795)].[6]

Deciding About Intent

You cannot look into a person's mind to find out intent. Intent must be found, if found

at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1194 was originally published in 1994 and revised in 1998, 2006, and 2013. The 2013 revision modified the instruction to reflect changes made by 2011 Wisconsin Act 268. This revision was approved by the Committee in August 2023; it added to the comment.

This instruction is for violations of sub. (2) of § 940.11. For violations of sub. (1) of the same statute, see Wis JI-Criminal 1193.

Section 940.11 was amended by 2011 Wisconsin Act 268 [effective date: April 24, 2012] to add an alternative intent element: intent to collect benefits under sections 49.141 Wisconsin works, 49.49 Medical assistance or 49.795 Food stamps.

Subsection (3) of § 940.11 provides as follows: "A person may not be subject to prosecution under both this section and § 946.47 or under both this section and § 948.23 for his or her acts regarding the same corpse." Section 946.47 defines the offense of Harboring Or Aiding Felons. Section 948.23 defines the offense of Concealing or Not Reporting the Death of a Child.

Per the provisions of Wis. Stat. § 939.66: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both." Further, subsection (7) of the statute clarifies that an included crime could be "the crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)." Therefore, a guilty verdict can be rendered for both a count of mutilating a corpse and a count of hiding or burying a corpse, but only one judgment of conviction can be entered for each corpse.

1. This alternative intent element was added to § 940.11(2) by 2011 Wisconsin Act 268 [effective date: April 24, 2012]. Section 49.141 refers to benefits under Wisconsin Works, 49.49 refers to medical assistance, and 49.795 refers to food stamps.

The material added to the statute by Act 268 reads: ". . . or notwithstanding s. 49.141(7), 49.49(1), or 49.795 with intent to collect benefits under one of those sections. . ." The statutes listed after "notwithstanding" are those that define criminal violations – what are typically referred to as "welfare fraud" or "food stamp fraud." The Committee interpreted this reference to mean that regardless of the other criminal penalties that may apply, an individual may be prosecuted under § 940.11 if the statute is violated with an intent to obtain benefits under those sections.

2. The evidence was found to be sufficient to establish that the defendant "hid" a corpse in State v. Badker, 2001 WI App 27, 240 Wis.2d 460, 623 N.W.2d 142. The court referred with apparent approval to the dictionary definition of "hide" as "to put or keep out of sight." 2001 WI App 27, ¶25, citing Webster's II New College Dictionary (1999).

3. "Corpse" means the dead body of a human being. American Heritage Dictionary of the English Language, 3rd Edition, 1992.

4. If the charging document specifies one of the alternatives (apprehension, prosecution, or conviction), or the evidence supports only one, only that alternative should be used in the instruction. If more than one alternative is supported by the evidence and included in the instruction, the Committee concluded that the jury need not be unanimous as to which applies because the alternatives do not state "conceptually distinct" categories. For a discussion of the same problem arising in connection with burglary with intent to commit a felony, see State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997).

5. "With intent to" is defined in § 939.23(4) as having the mental purpose to cause the result or being "aware that his or her conduct is practically certain to cause that result." The Committee believes that the mental purpose alternative is most likely to apply to this offense. Also see Wis JI-Criminal 923A and 923B.

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1211 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON SUFFERING FROM MENTAL ILLNESS — § 940.225(2)(c)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual (contact) (intercourse) with (name of victim).
2. (Name of victim) suffered from a mental (illness) (deficiency) at the time of the sexual (contact) (intercourse).[1]
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising (his) (her) conduct. In other words, (name of victim) must have lacked the ability to evaluate the significance of (his) (her) conduct because of (his) (her) mental (illness) (deficiency).[2]

4. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising (his) (her) conduct.[3]

Meaning of ["Sexual Contact"] ["Sexual Intercourse"]

REFER TO WIS JI-CRIMINAL 1200A FOR THE DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR THE DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.[4]

[Use of Consent Evidence]

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising her conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising her conduct).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 1980 as Wis JI-Criminal 1212 [for sexual intercourse offenses] and Wis JI-Criminal 1213 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1211 was published in 1996 and revised in 1998, 2002, 2015, and 2021. This revision was approved by the Committee in December 2023; it amended to the comment.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Section 940.225(2)(c) provides that it is second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition." This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent, where, in satisfying the consent element, the state relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim "suffers from a mental illness or defect which impairs capacity to appraise personal conduct." This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim's mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense, the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, "without consent" is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense, therefore, requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsec. (2)(c).

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The Committee decided not to define "mental illness or deficiency" in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or deficiency" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: ". . . which renders that person temporarily or permanently incapable of appraising the person's conduct."

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals court cited the discussion above with apparent approval. The court held that "[W]hen, as here, there is lay opinion testimony supported by ample testimony as to the victim's behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony." Also see State v. Onyeukwu, 2104AP518 CR, [not published] for an example of a decision finding the evidence sufficient to establish "mental deficiency" based on evidence showing that the 22 year old victim "was probably functioning on a sixth-grade level." ¶16.

2. This is an attempt to elaborate on the meaning of "rendered the person temporarily or permanently incapable of appraising the person's conduct." It is adapted from the discussion in State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

3. Section 940.225(2)(c) requires that the defendant know of the victim's condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency "renders the person temporarily or permanently incapable of appraising the person's conduct."

4. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)." Thus, "without consent" is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising his or her conduct and whether the defendant knew that the victim was suffering from a mental illness that rendered her incapable of appraising his or her conduct.

1231 BATTERY OR THREAT TO A PROBATION, EXTENDED SUPERVISION AND PAROLE AGENT, COMMUNITY SUPERVISION AGENT, OR AN AFTERCARE AGENT — § 940.20(2m)

Statutory Definition of the Crime

Section 940.20(2m) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) where at the time of the (act) (threat) the defendant knows or has reason to know that the victim is (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)), the (act) (threat) is in response to an action by the agent acting in (his) (her) official capacity, and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing the bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was ((a probation, extended supervision and parole agent)[4] (a community supervision agent)[5] (an aftercare agent)[6]) (a family member of (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent)).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat), the defendant knew, or had reason to know, that (name of victim) was (a probation, extended supervision and parole agent) (a community supervision agent) (an aftercare agent) (a family member of (a probation, extended supervision and parole agent) (a community supervision

agent) (an aftercare agent)).[8]

4. The (act) (threat) was in response to an action taken by the agent acting in (his) (her) official capacity.

(Probation, extended supervision and parole agents) (community supervision agents) (aftercare agents) act in an official capacity when they perform duties that they are employed[9] to perform.[10] [These duties include: _____.][11]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[12] of (name of victim).

6. The defendant acted intentionally.[13] This requires that the defendant intended to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[14]

Meaning of "Intentionally"

Intent to (cause) (threaten to cause) bodily harm means that the defendant had the mental purpose to (cause) (threaten to cause) bodily harm to another human being or was aware that (his) (her) conduct was practically certain to cause bodily harm to another.[15]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1231 was originally published in 1994 and revised in 1996, 2005, 2008, 2019, and 2022. The 2022 revision amended the body of the instruction and the comment based on 2021 Wisconsin Act 187. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.20(2m) was created by 1989 Wisconsin Act 336 and originally applied to battery of probation and parole agents. It was amended by 1995 Wisconsin Act 77 to include battery to "aftercare agents." [Effective date: July 1, 1996]. "Extended supervision agents" were added by 1997 Wisconsin Act 283. [Effective date: June 24, 1998]. 2015 Wisconsin Act 55 added "community supervision agents" [with a delayed effective date of September 24, 2017]. § 940.20 (2m)(b) 2021 was amended by Wisconsin Act 187 to provide that it is a Class H felony to commit, or threaten to commit, battery against an agent or the family member of an agent. The Act also amended the definitions of "aftercare agent" and "community supervision agent" [Effective date: March 19, 2022].

1. This is the definition provided in § 939.22(4).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also, see Wis JI-Criminal 901 Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

4. Section 940.20(2m)(a)2. provides that "'probation, extended supervision and parole agent' means any person authorized by the department of corrections to exercise control over a probationer, parolee, or person on extended supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a probationer, parolee, or person on extended supervision or a comparable program that is authorized by the tribe or band."

5. "Community supervision agent" is defined as follows in § 940.20(2m)(a)1m.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on community supervision or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile

on community supervision or a comparable program that is authorized by the tribe or band."

6. "Aftercare agent" is defined as follows in § 940.20(2m)(a)1.: ". . . any person authorized by the department of corrections to exercise control over a juvenile on aftercare or authorized by a federally recognized American Indian tribe or band to exercise control over a juvenile on aftercare or a comparable program that is authorized by the tribe or band."

7. Section 940.20 (2m) (a) 1p. provides:

"Family member" means a spouse, child, stepchild, foster child, parent, sibling, or grandchild.

8. The "knew or had reason to know" requirement is taken directly from § 940.20(2m)(b)1. It is treated as a separate element rather than being combined with the sixth element, where knowledge of lack of consent is addressed. This is because the "reason to know" standard differs from the actual knowledge that is required when the word "intentionally" is used in a criminal statute. See § 939.23(3).

The instruction applies the "reason to know" standard to the victim's status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family and the agent "acting in an official capacity." The statute expressly applies "reason to know" only to status as a probation, extended supervision and parole agent, a community supervision agent, or an aftercare agent, or a member of the agent's family. But the two requirements are so closely connected that the Committee concluded the same knowledge standard has to apply to each.

9. "Employed" is used here in the general sense of being engaged in the performance of a duty.

10. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see, State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and, State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

Wisconsin Administrative Code, Chapter DOC 328, Community Supervision Of Offenders, provides "rules, services, and programs for offenders who are under the supervision of the department." DOC 328.04(2) extensively describes the duties of agents who provide community supervision. All the agents specified in § 940.20(2m) must be "authorized by the department to exercise control" over specific categories of persons who are being supervised. See the definitions quoted in footnotes 3, 4, and 5 above. Thus, it appears that all would be subject to the standards and grants of authority in DOC 328.

12. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

13. Intentionally" requires either mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2m)(b) proper and the other facts that follow.

14. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

15. See note 12, supra.

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1238 BATTERY OR THREAT TO A WITNESS [WITNESS HAS ATTENDED OR TESTIFIED] — § 940.201

Statutory Definition of the Crime

Section 940.201 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to a person who he or she knows or has reason to know is or was a witness by reason of the person having attended or testified as a witness and without the consent of the person harmed or threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[1]

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's conduct was a substantial factor in producing bodily harm.][2]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated

orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant knew [or had reason to know] that (name of victim) was a witness.[5]

4. The defendant (caused) (threatened to cause) bodily harm to (name of victim) because[6] the person attended or testified as a witness.

5. The defendant (caused) (threatened) bodily harm without the consent[7] of (name of victim).

6. The defendant acted intentionally.[8] This requires that the defendant acted with the mental purpose to (cause) (threaten) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1238 was originally published 1998 and revised in 2004 and 2022. The 2004 revision involved the adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

In 1998, this instruction replaced Wis JI-Criminal 1232 for offenses against witnesses. Wis JI-Criminal 1232 has been revised to apply only to battery against a juror.

This instruction is for violations of § 940.201(2)(a), where the alleged battery has taken place after the victim has testified or attended as a witness. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called. For that type of case, the second and fourth elements must be modified. See footnotes 4 and 6 below. Wis JI-Criminal 1239, which formerly provided a separate instruction for that type of case, has been withdrawn. [The withdrawal note for Wis JI-Criminal 1239 contains a summary of McLeod.

Section 940.201 was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3). Act 143 expanded the scope of the

statute by including threats to cause bodily harm and, in sub. (2)(b) threats to cause and causing of bodily harm against family members of a witness. If a threat or harm to a family member of a witness is involved, the instruction must be modified.

1. This is the definition of "bodily harm" provided in § 939.22(4).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal

liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.201. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the predecessor to § 943.201 B § 940.26, 1975 Wis. Stats. B also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of "witness" in the second element should be modified to refer to "a person who is expected to be summoned to testify."

5. The statute includes the requirement that the defendant "knew or had reason to know" that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim because the victim had testified, the defendant must have known that the victim was a witness. However, because the "knew or had reason to know" requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person "by reason of" that person having testified would have known that person was a witness. Thus, the "had reason to know" alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

6. This element is drafted for a case where the person has attended or testified. If that statement does not fit the status of the victim, the statement must be modified. See note 4, supra.

The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

7. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2m)(b) proper and the other facts that follow.

9. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally."

1240B THREAT TO A JUDGE — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of any judge where, at the time of the act, the person knows[1] that the victim is a (judge) (family member of a judge), the act is in response to an action taken in the judge's official capacity,[2] and there is no consent by the person harmed.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

   [A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

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

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

   [For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. The threat was in response to an action taken in the judge's official capacity.

   Judges act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a judge include: _____].[10]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to threaten bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and

knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240B was originally published in 1994 and revised in 2002, 2016, 2018, 2019, and 2020. The 2002 revision divided the single instruction into two instructions, WI JI-Criminal 1240A and 1240B. Wis JI-Criminal 1240A was revised in 2008 to change the definition of "official capacity." The 2016 revision updated the Comment to reflect changes made by the 2015 Wisconsin Act 78. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 and 2017 Wisconsin Act 352. The 2020 revision added the definition of "true threat." This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.203 was created by 1993 Wisconsin Act 50 [effective date: November 25, 1993] and originally applied only to offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018] to include officers of the court. 2017 Wisconsin Act 352 [effective date: April 18, 2018] amended the definitions of "judge" and "law enforcement officer." This instruction is drafted for violations under § 940.203 involving threats to a judge; for violations based on battery to a judge, see Wis-JI Criminal 1240A. For battery and threats to prosecutors and law enforcement officers, see Wis JI-Criminal 1240C and 1240D. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. 2015 Wisconsin Act 109 amended § 940.203 to delete what was previously an alternative for this aspect of the offense definition: "… the judge is acting in an official capacity at the time of the act or threat…"

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

4. This is the definition of "bodily harm" provided in § 939.22(4).

5. Section 940.203(1)(b) provides a definition of "judge" for the purpose of this offense. As amended by 2017 Wisconsin Act 352, that definition provides: "'Judge' means a person who currently is

or who formerly was a supreme court justice, court of appeals judge, circuit court judge, municipal judge, tribal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner."

The applicable term should be inserted in the blank.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties of judges may be set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1240D THREAT TO A PROSECUTOR OR LAW ENFORCEMENT OFFICER — § 940.203(2)

Statutory Definition of the Crime

Section 940.203 of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of a (prosecutor) (law enforcement officer) where at the time of the threat the person knows[1] that the victim is a current or former [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)], the threat is in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity and there is no consent by the person threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary

that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

[A (e.g., district attorney) is a prosecutor.][4]

[A (insert title, e.g., sheriff) is a law enforcement officer.][5]

[For the purpose of this offense, a (e.g., child) is a family member.][6]

3. The defendant knew[7] that (name of victim) was a [(prosecutor) (law enforcement officer)] [family member of a (prosecutor) (law enforcement officer)].

4. The threat was in response to an action taken in the (prosecutor's) (law enforcement officer's) official capacity.

(Prosecutors) (law enforcement officers) act in an official capacity when they perform duties that they are employed[8] to perform.[9] [The duties of a (prosecutor) (law enforcement officer) include: _____].[10]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to threaten bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name

of victim) did not consent to the causing of bodily harm.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1240D was originally published in 2016 and revised in 2017, 2018, and 2019. The 2018 revision reflected changes made by 2017 Wisconsin Act 272 [effective date: April 13, 2018] and 2017 Wisconsin Act 352 [effective date: April 18, 2018]. The 2019 revision corrected a typographical error in element one. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.203 originally applied only to offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 to include officers of the court. This instruction is drafted for violations under § 940.203 involving threats to a prosecutor or law enforcement officer; for violations based on battery to a prosecutor or law enforcement officer, see Wis-JI Criminal 1240AC. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a current or former guardian ad litem, corporation counsel, or attorney, see Wis JI-Criminal 1241A and 1241B.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the

phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the prosecutor's or law enforcement officer's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, 28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46, 43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, 29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, 23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S., 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. In the Committee's judgment, the jury may be told, for example, that the district attorney is a prosecutor. It is still for the jury to be satisfied that, in the example, the victim was a district attorney. Section 940.203(d) provides a definition of "prosecutor" for the purposes of this offense:

"Prosecutor" means a person who currently is or formerly was any of the following:

1. A district attorney, a deputy district attorney, an assistant district attorney, or a special prosecutor under s. 978.045 or 978.05(8)(b).
2. The attorney general, a deputy attorney general, or an assistant attorney general.
3. A tribal prosecutor.

The applicable term should be inserted in the blank.

5. In the Committee's judgment, the jury may be told, for example, that a sheriff is a law enforcement officer. It is still for the jury to be satisfied that, in the example, the victim was sheriff.

Section 940.203(1)(c), as amended by 2017 Wisconsin Act 352, provides the following definition of "law enforcement officer":

(c) "Law enforcement officer" means any person who currently is or was employed by the state, by any political subdivision, or as a tribal law enforcement officer for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances the person is employed to enforce, whether that enforcement authority extends to all laws or ordinances or is limited to specific laws or ordinances.

6. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

11. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.203, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1241B THREAT TO GUARDIAN AD LITEM, CORPORATION COUNSEL, TRIBAL COURT ADVOCATE, OR ATTORNEY — § 940.203(3)

Statutory Definition of the Crime

Section 940.203(3) of the Criminal Code of Wisconsin is violated by one who intentionally threatens to cause bodily harm to the (person) (family member) of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) where at the time of the threat the person knows[1] that the victim is [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)], the threat is in response to an action taken in the (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity and there is no consent by the person threatened.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause bodily harm to (name of victim).

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression

of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][2]

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[3]

2. (Name of victim) was a [current or former (guardian ad litem)[4] (corporation counsel)[5] (tribal court advocate)[6] (attorney)[7]] [family member of a current or former (guardian ad litem) (corporation counsel) (tribal court advocate) (attorney)].

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. The defendant knew[9] that (name of victim) was [(a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)] [a family member of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney)].

4. The threat was in response to an action taken in the current or former (guardian ad litem's) (corporation counsel's) (tribal court advocate's) (attorney's) official capacity in a

[specify the proceeding under Wisconsin statutes chapter _____] [specify the proceeding in a tribal court similar to Wisconsin statutes chapter _____.][10]

(Guardians ad litem) (Corporation counsel) (Tribal court advocates) (Attorneys) act in an official capacity when they perform duties that they are employed[11] to perform.[12] [The duties of (a guardian ad litem) (a corporation counsel) (a tribal court advocate) (an attorney) include: _____].[13]

[A _____ is a proceeding under chapter (specify the Wisconsin Statutes chapter)].[14]

[A _____ is a proceeding in a tribal court.][15]

5. The defendant threatened to cause bodily harm to (name of victim) without the consent[16] of (name of victim).

6. The defendant acted intentionally.[17] This requires that the defendant acted with the mental purpose to threaten bodily harm to another human being, or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[18]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in case this bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have

been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1241B was approved by the Committee in July 2018 and revised in 2022. The 2022 revision amended the body of the instruction and the comment based on 2021 Wisconsin Act 191 [effective date: March 19, 2022]. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.203 originally applied only to offenses against judges and their family members. It was amended by 2015 Wisconsin Act 78 [effective date: November 13, 2015] to add prosecutors and law enforcement officers. Section 940.203 was amended again by 2017 Wisconsin Act 272 [effective date: April 13, 2018]. The title of § 940.203 was amended to read as "Battery or threat to a judge, prosecutor, an officer of the court or law enforcement officer." "Advocate" was added by 2021 Wisconsin Act 191 [effective date: March 19, 2022].

This instruction is drafted for violations under § 940.203(3) involving threats to a current or former guardian ad litem, corporation counsel, advocate, or attorney; for violations based on battery to a current or former guardian ad litem, corporation counsel, advocate, or attorney, see Wis JI-Criminal 1241A. For battery and threats to a judge, see Wis JI-Criminal 1240A and 1240B. For battery and threats to a prosecutor or law enforcement officer, see Wis JI-Criminal 1240C and 1240D.

1. Neither the summary of the offenses here nor the third element contain the alternative "or should have known" found as part of the offense definition in sec. 940.203(2)(a). The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and guardian ad litem's, corporation counsel's, advocate's, or attorney's official capacity. That is, the act or threat must be committed in response to an action taken in the person's official capacity. Therefore, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of the statute criminalizing language is much narrower." 2001 WI 46,

¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in context and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm to another…"

3. This is the definition of "bodily harm" provided in § 939.22(4).

4. Section 54.40(2) provides the duties of "guardian ad litem."

5. Section 59.42 provides the duties of "corporation counsel."

6. Section 940.203 (1)(ab) provides that "Advocate" means an individual who is representing the interests of a child, the tribe, or another party in a tribal court proceeding.

7. Section 940.203(1)(ac) provides that "attorney" means a legal professional practicing law as defined in SCR 23.01. The practice of law in Wisconsin is defined in SCR 23.01 as "[t]he application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) where there is a client relationship of trust or reliance and which require the knowledge, judgment, and skill of a person trained as a lawyer. The practice of law includes but is not limited to:

   1. Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.

2. Selection, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s).
3. Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
4. Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
5. Any other activity determined to be the practice of law by the Wisconsin Supreme Court.

The applicable term should be inserted in the blank.

8. Section 940.203(1)(a) provides a definition of "family member" for the purpose of this offense: "'Family member' means a parent, spouse, sibling, child, stepchild, or foster child."

9. See note 1, supra.

10. Section 940.203(3)(b) specifies that the act be in response to "an action taken by the current or former guardian ad litem, corporation counsel, advocate, or attorney in his or her official capacity in a proceeding under ch. 48, 51, 54, 55, 767, 813, or 938 or in a similar proceeding in a tribal court."

11. "Employed" is used here in the general sense of being engaged in the performance of a duty.

12. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

13. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

14. Wisconsin Statutes ch. 48, 51, 54, 55, 767, 813, or 938.

15. One of the alternatives in brackets should be selected.

16. If the definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

17. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered

by the drafting style of § 940.203, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should have known" and thereby breaks the connections between "intentionally" used in sub. (2) proper and the other facts that follow.

18. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1242 BATTERY OR THREAT TO A DEPARTMENT OF REVENUE EMPLOYEE — § 940.205

Statutory Definition of the Crime

Section 940.205 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of Revenue employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (Department of Revenue employee) (family member of a Department of Revenue employee), [the Department of Revenue employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the Department of Revenue employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

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

IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat) the defendant knew[8] that (name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

4. [The Department of Revenue employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the Department of Revenue employee's official capacity.][9]

Department of Revenue employees act in an official capacity when they

perform duties that they are employed[10] to perform.[11] (The duties of a Department of Revenue employee include: _____.)[12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally.[14] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[15]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1242 was originally published in 1994 and revised in 2004, 2008, and 2022. The 2004 revision added a definition of "true threat." The 2008 revision amended the definition of "official capacity."

This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.205 was created by 1985 Wisconsin Act 29.

1. Section 940.205 applies to offenses against the person or family of any department of revenue "official, employee or agent." The instruction refers to "employee" throughout since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the Department of Revenue employee's official capacity. That is, the threat or act must be committed either when the Department of Revenue employee is acting in an official capacity or in response to an action taken in the Department of Revenue employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected

speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

7. Section 940.205(1) provides:

"In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

13. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

14. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.205, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

15. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1244 BATTERY OR THREAT TO A DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES OR DEPARTMENT OF WORKFORCE DEVELOPMENT EMPLOYEE — § 940.207

Statutory Definition of the Crime

Section 940.207 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any Department of (Safety and Professional Services) (Workforce Development) employee[1] where at the time of the (act) (threat), the person knows[2] that the victim is a (department employee) (family member of a department employee), [the employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

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

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was (an employee of) (a family member of an employee of) the Department of (Safety and Professional Services) (Workforce Development).

[For the purpose of this offense, a (e.g., child) is a family member.][7]

3. At the time of the (act) (threat), the defendant knew[8] that (name of victim) was (an employee of) (a family member of an employee of) the Department of (Commerce) (Workforce Development).

4. [The employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the employee's official capacity.][9]

Employees act in an official capacity when they perform duties that they are

employed[10] to perform.[11] [The duties of a Department of (Safety and Professional Services) (Workforce Development) employee include:_____.][12]

5. The defendant (caused) (threatened to cause) bodily harm without the consent[13] of (name of victim).

6. The defendant acted intentionally. This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[15]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1244 was originally published in 1994 and revised in 1998, 2004, 2008, 2012, and 2022. The 2012 revision changed the reference from the Department of Commerce to the Department of Safety and Professional Services. This revision was approved by the Committee in October 2023. It

amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.207 was created by 1993 Wisconsin Act 86. A series of legislative changes affected the types of employees covered by the statute. As amended by 1997 Wisconsin Act 3, the statute applies to battery or threat to employees and family members of employees of the Department of Commerce and the Department of Workforce Development. 2011 Wisconsin Act 32 changed "Department of Commerce" to "Department of Safety and Professional Services."

1. Section 940.207 applies to offenses against the person or family of any department "official, employee or agent." The instruction refers to "employee" throughout since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the threat or act must be committed either when the employee is acting in an official capacity or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

A true threat is a statement that a speaker would reasonably foresee that a listener would

> reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

7. Section 940.207(1) provides:

> "In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

8. See note 2, supra.

9. One of the alternatives in brackets should be selected.

10. "Employed" is used here in the general sense of being engaged in the performance of a duty.

11. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

12. The duties, powers, or responsibilities of some public officers, officials, and employees are set forth in the Wisconsin Statutes or Administrative Code. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743

N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

General powers and duties of the Department of Commerce are set forth in § 101.02, Wis. Stats.; those of the Department of Workforce Development are set forth in § 103.005, Wis. Stats.

13. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

14. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

15. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1247A BATTERY OR THREAT TO A STAFF MEMBER OF A HEALTH CARE FACILITY — § 940.204(2)

Statutory Definition of the Crime

Section 940.204(2) of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) bodily harm to the (person) (family member) of any health care facility worker[1] where at the time of the (act) (threat), the person knows[2] that the victim ((works) (formerly worked) in a health care facility) (is a family member of a person who (works) (formerly worked) in a health care facility), [the (act) (threat) is in response to an action occurring at the health care facility], [the (act) (threat) is in response to an action taken in the employee's official capacity],[3] and there is no consent by the person (harmed) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) bodily harm to (name of victim).

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

   IF THE CASE INVOLVES CAUSING BODILY HARM, ADD THE FOLLOWING:

["Cause" means that the defendant's act was a substantial factor in producing the bodily harm.][5]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][6]

2. (Name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.[7]

[For the purpose of this offense, a (e.g., child) is a family member.][8]

3. At the time of the (act) (threat), the defendant knew or should have known[9] that (name of victim) was ((a worker at) (a former worker at)) (a family member of (a worker at) (a former worker at)) a health care facility.

4. [The (act) (threat) was in response to an action occurring at the health care facility.] [The (act) (threat) was in response to an action taken by the official, employee, or agent of a health care facility acting in their official capacity.][10]

IF THE CASE INVOLVES AN OFFICIAL, EMPLOYEE, OR AGENT OF THE HEALTH CARE FACILITY ACTING IN AN OFFICIAL CAPACITY, ADD THE FOLLOWING:

Officials, employees, or agents of the health care facility act in an official capacity when they perform duties that they are authorized to perform.

5. The defendant (caused) (threatened to cause) bodily harm without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) bodily harm to (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent to the causing of bodily harm.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[14]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal was 1247A approved by the Committee in April 2022. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 940.204(2) was created by 2022 Wisconsin Act 209 [effective date: March 25, 2022]. This instruction applies to battery or threat to a staff member of a health care facility and family members of a staff member of a health care facility. For battery or threat to a health care provider, see Wis JI-Criminal 1247B.

1. Section 940.204(2) applies to offenses against the person or family of anyone "who works in a health care facility." The instruction refers to "worker" throughout since that appears to be the most inclusive term.

2. Neither the summary of the offense here nor the third element contain the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the employee's official capacity. That is, the act or threat must be committed either in response to an action occurring at the healthcare facility or in response to an action taken in the employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

3. One of the alternatives in brackets should be selected.

4. This is the definition provided in § 939.22(4).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

6. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats." Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing

threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce "any communication containing any threat … to injure the person of another." 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of "true threat" used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that "the defendant acted with the mental purpose to threaten bodily harm" to another…

7. Section 940.204(1)(b) provides:

"In this section: 'health care facility' means any of the following:

1. A hospital, as defined in s. 50.33 (2).
2. A clinic, which is a location with the primary purpose of providing outpatient diagnosis, treatment, or management of health conditions.
3. A pharmacy that is licensed under s. 450.06.
4. An adult day care center, as defined in s. 49.45(47).
5. An adult family home, as defined in s. 50.01 (1).
6. A community−based residential facility, as defined in s. 50.01 (1g).
7. A residential care apartment complex, as defined in s. 50.01 (6d).
8. A nursing home, as defined in s. 50.01 (3).
9. A mental health or substance use disorder facility, which is a location that provides diagnosis, treatment, or management of mental health or substance use disorders.
10. An ambulatory surgical center, as defined in 42 CFR 416.2."

8. Section 940.204(1)(a) provides:

"In this section: 'family member' means a parent, spouse, sibling, child, stepchild, or foster child."

The applicable term should be inserted in the blank.

9. See note 2, supra.

10. Based on the evidence, one or both of the alternatives in brackets should be selected. If the evidence supports selecting both, the alternatives should be separated by the disjunctive "or."

11. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.204(2), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

14. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A.

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CRIMINAL

VOLUME IIA

Wisconsin Criminal Jury Instructions Committee

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1338 CARRYING A HANDGUN ON PREMISES WHERE ALCOHOL BEVERAGES ARE CONSUMED — § 941.237

Statutory Definition of the Crime

Section 941.237 of the Criminal Code of Wisconsin is violated by one who intentionally goes armed with a handgun on any premises licensed for the sale and consumption of alcohol beverages.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant went armed with a handgun.

   The phrase "went armed" means that a firearm must have been on the defendant's person or that a firearm must have been within the defendant's reach.[2] In addition, the defendant must have been aware of the presence of the firearm.[3]

   ["Handgun" means any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of an explosive to expel a projectile through a smooth or rifled bore.][4]

2. The defendant went armed with a handgun on a premises licensed for the sale and consumption of alcohol beverages.[5]

3. The defendant acted intentionally.

This requires that the defendant knew that (he) (she) was armed with a handgun and knew that the premises was licensed for the sale and consumption of alcohol beverages.[6]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1338 was originally published in 1996 and revised in 2007, 2011, and 2019. The 2019 revision amended the definition of "went armed" defined under element 1 and updated notes 2 and 3 in the Comment. This revision was approved by the Committee in October 2023. It addressed the repeal of subsection 941.237(4) and the introduction of Wis JI-Criminal 1338A, which concerns the exceptions set forth in § 941.237(3)(a) – (j).

This instruction is for a violation of § 941.237, created by 1993 Wisconsin Act 95, effective date: December 25, 1993. The offense is defined in sub. (2): "Whoever intentionally goes armed with a handgun on any premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125 is guilty of a Class A misdemeanor." As to Class "B" and "Class B" licenses, see note 1 below.

Numerous exceptions are provided in § 941.237(3)(a) through (j). 2011 Wisconsin Act 35 amended

§ 941.237(3) by creating subds. (cr)-(cx), which recognize three additional exceptions:

- a qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g) – sub. (3)(cr)
- a former officer, as defined in s. 941.23(1)(c) – sub. (3)(ct)
- a licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g) if the licensee is not consuming alcohol on the premises – sub. (3)(cx).

See Wis JI-Criminal 1338A for a corresponding instruction concerning the exceptions set forth in § 941.237(3)(a) – (j).

2011 Wisconsin Act 35 repealed subsection (4) of section 941.237. This subsection stated that "[T]he state does not have to negate any exception under sub. (3). Any party that claims that an exception under sub. (3) is applicable has the burden of proving the exception by a preponderance of the evidence."

Prior to the enactment of 2011 Wisconsin Act 35, it appears that the burden of disproving an exception under sub. (3) never shifted to the State, regardless of whether the defendant successfully demonstrated the exception by a preponderance of the evidence. However, the repeal of sub. (4) without any replacement language brought about two significant changes.

First, the removal of sub. (4) relieved the defendant from the burden of proving the exception by a preponderance of the evidence. The Committee believes it is now sufficient for the defendant to simply point to or produce "some evidence" in support of an exception under sub. (3) in order to fulfill their required burden.

Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution; facts elicited from prosecution witnesses by defense cross-examination or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996).

Secondly, in the event that the defendant meets the "some evidence" standard, the Committee believes that the burden shifts to the State to disprove the exception beyond a reasonable doubt. See Wis JI-Criminal 1338A.

1. This phrase is used in place of the following statutory language: ". . . premises for which a Class "B" or "Class B" license or permit has been issued under ch. 125." The Class "B" license is described in § 125.26(1); it "authorizes retail sales of fermented malt beverages to be consumed either on the premises where sold or off the premises." The Class "B" permit is described in § 125.27(1); it applies to country clubs and similar clubs not open to the general public and "authorizes retail sales of fermented malt beverages to be consumed on the premises where sold." The "Class B" license is described in § 125.51(3); it "authorizes the retail sale of intoxicating liquor for consumption on the premises where sold by the glass and not in the original package or container."

In addition to avoiding the inherent difficulty in communicating to a jury the difference between a "Class B" license and a Class "B" license, the phrase used in the instruction is believed to address the core conduct the statute was intended to address: carrying a handgun into a tavern. Though not used in subsection

(2), which defines the offense, "tavern" does appear in some of the exceptions listed in subsection (3). And it is defined as follows in subsection (1)(fm): "'Tavern' means an establishment, other than a private club or fraternal organization, in which alcohol beverages are sold for consumption on the premises."

2. This is the definition of "went armed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. See note 2 of that instruction for cases discussing "went armed."

3. The "aware of the presence" requirement was approved as a correct statement of the law in State v. Asfoor, where the court stated that "[c]oncealing or hiding a weapon precludes inadvertence." 75 Wis.2d 411, 415, 249 N.W.2d 529 (1976). The concept is similar to that involved for offenses requiring "possession." See Wis JI-Criminal 920. For cases identifying "aware of the presence" as an element of the crime, see note 3 of Wis JI-Criminal 1335. The 1995 revision of that instruction added "aware of the presence" as a separate element.

4. This is the definition of "handgun" provided in § 175.35(1)(b). That definition is adopted by cross-reference in § 941.237(1)(d).

5. See note 1, supra.

6. The Committee concluded that in this statute, the significance of the use of the word "intentionally" is to require knowledge that one is armed and knowledge that the premises is a licensed one. See § 939.23(3).

1338A CARRYING A HANDGUN ON PREMISES WHERE ALCOHOL BEVERAGES ARE CONSUMED — EXCEPTIONS UNDER § 941.237(3)(a) – (j)[1]

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[2]

Carrying a Handgun on Premises Where Alcohol Beverages are consumed Under Wis. Stat. § 941.237(2)

The defendant's possession of a handgun on a premises licensed for the sale and consumption of alcohol beverages is an issue in this case. The law allows an individual to intentionally go armed with a handgun on a premises licensed for the sale and consumption of alcohol beverages[3] if [CHOOSE ONE OF THE FOLLOWING][4]

[the individual is a peace officer.][5]

[the individual is a correctional officer while going armed in the line of duty.][6]

[the individual is a member of the U.S. armed forces or national guard while going armed in the line of duty.]

[the individual is a private security person meeting all of the following criteria:

1. The private security person is covered by a license or permit issued under s. 440.26.

2. The private security person is going armed in the line of duty.

3. The private security person is acting with the consent of the person specified in par. (d).][7]

[the individual is a qualified out-of-state law enforcement officer, as defined in s.

941.23(1)(g), to whom s. 941.23(2)(b)1. to 3. applies.][8]

[the individual is a former officer, as defined in s. 941.23(1)(c), to whom s. 941.23(2)(c)1. to 7. applies.][9]

[(1) the individual is a (licensee, as defined in s. 175.60(1)(d)[10]) (out-of-state licensee, as defined in s. 175.60(1)(g)[11]) and, (2) is not consuming alcohol on the premises.]

[the individual is the licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.]

[the individual is in possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.]

[the individual is in possession or use of a handgun at a public or private gun or sportsmen's range or club.]

[the individual is in possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B" license or permit under ch. 125 for the premises.]

[the individual is in possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.]

[the individual is in possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.]

[the individual is in possession of a handgun in any portion of a combination tavern

and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the exception of (insert the applicable statutory exception) did not apply to the defendant.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of carrying a handgun on premises where alcohol beverages are consumed have been proved and that the exception of (insert the applicable statutory exception) did not apply to the defendant, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1338A was approved by the Committee in October 2023.

This instruction is drafted for the exceptions set forth in § 941.237(3)(a) – (j).

2011 Wisconsin Act 35 [effective date: November 1, 2011] created a process to obtain a license to carry a concealed weapon. A person who is licensed or who is an out-of-state licensee is exempted from the crime that prohibits carrying a handgun where alcohol beverages are sold and consumed if the person is not consuming alcohol on the premises.

2011 Wisconsin Act 35 repealed subsection (4) of section 941.237. This subsection stated that "[T]he state does not have to negate any exception under sub. (3). Any party that claims that an exception under

sub. (3) is applicable has the burden of proving the exception by a preponderance of the evidence."

The Committee believes that prior to the enactment of 2011 Wisconsin Act 35, the burden of disproving an exception under sub. (3) never shifted to the state, regardless of whether the defendant successfully demonstrated the exception by a preponderance of the evidence. However, the repeal of sub. (4) without any replacement language resulted in two significant changes.

First, the removal of sub. (4) relieved the defendant from the burden of proving the exception by a preponderance of the evidence. The Committee believes it is now sufficient for the defendant to simply point to or produce "some evidence" in support of an exception under sub. (3) in order to fulfill their required burden.

Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). Though the burden of producing "some evidence" of a defense is commonly referred to as the defendant's burden, that is not literally correct. The source of the evidence may be facts presented by the prosecution; facts elicited from prosecution witnesses by defense cross-examination or evidence affirmatively presented by the defense. State v. Coleman, 206 Wis.2d 199, 214, 556 N.W.2d 701 (1996).

Secondly, in the event that the defendant meets the "some evidence" standard, the Committee believes that the burden shifts to the State to disprove the exception beyond a reasonable doubt.

1. Subsections 941.237(3)(a)–(j) set forth a list of statutory exceptions. The jury instructions typically treat these exceptions like an affirmative defense. That is, the state need not anticipate them in the charging document, and they are not issues in the case until supported by "some evidence." If so supported, the state must prove the inapplicability of the exception beyond a reasonable doubt. See, e.g., Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979). See also Wis JI-Criminal 700, Sec. II, 3.

§ 941.237(3) provides that subsection (2) does not apply to any of the following:

(a) A peace officer.
(b) A correctional officer while going armed in the line of duty.
(c) A member of the U.S. armed forces or national guard while going armed in the line of duty.
(cm) A private security person meeting all of the following criteria:
    1. The private security person is covered by a license or permit issued under s. 440.26.
    2. The private security person is going armed in the line of duty.
    3. The private security person is acting with the consent of the person specified in par. (d).
(cr) A qualified out-of-state law enforcement officer, as defined in s. 941.23(1)(g), to whom s. 941.23(2)(b)1. to 3. applies.
(ct) A former officer, as defined in s. 941.23(1)(c), to whom s. 941.23(2)(c)1. to 7. applies.
(cx) A licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g), if the licensee or out-of-state licensee is not consuming alcohol on the premises.
(d) The licensee, owner, or manager of the premises, or any employee or agent authorized to possess a handgun by the licensee, owner, or manager of the premises.

(e) The possession of a handgun that is unloaded and encased in a vehicle in any parking lot area.
(f) The possession or use of a handgun at a public or private gun or sportsmen's range or club.
(g) The possession or use of a handgun on the premises if authorized for a specific event of limited duration by the owner or manager of the premises who is issued the Class "B" or "Class B" license or permit under ch. 125 for the premises.
(h) The possession of any handgun that is used for decoration if the handgun is encased, inoperable or secured in a locked condition.
(i) The possession of a handgun in any portion of a hotel other than the portion of the hotel that is a tavern.
(j) [in] The possession of a handgun in any portion of a combination tavern and store devoted to other business if the store is owned or operated by a firearms dealer, the other business includes the sale of handguns and the handgun is possessed in a place other than a tavern.

2. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

3. "Alcohol beverages" is defined as follows in §125.02(1)

"Alcohol beverages" means fermented malt beverages and intoxicating liquor.

4. The applicable statutory exception should be selected. The alternatives are those provided in sub. (3)(a) – (j) of § 941.237.

5. "Peace officer" is defined as follows in § 939.22(22):

"Peace officer" means any person vested by law with a duty to maintain public order, whether that duty extends to all crimes or is limited to specific crimes.

6. "Correctional officer" is defined as follows in § 941.237(1)(b):

"Correctional officer" means any person employed by the state or any political subdivision as a guard or officer whose principal duties are the supervision and discipline of inmates.

7. "Private security person" is defined as follows in §440.26 (1m):

"Private security person" means any private police, guard, or any person who stands watch for security purposes.

8. "Qualified out-of-state law enforcement officer" is defined as follows in § 941.23:

"Qualified out-of-state law enforcement officer" means a law enforcement officer to whom all of the following apply:

1. The person is employed by a state or local government agency in another state.

2. The agency has authorized the person to carry a firearm.
3. The person is not the subject of any disciplinary action by the agency that could result in the suspension or loss of the person's law enforcement authority.
4. The person meets all standards established by the agency to qualify the person on a regular basis to use a firearm.
5. The person is not prohibited under federal law from possessing a firearm.

"Law enforcement officer" is defined as a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest. See § 175.49(1)(g).

"Law enforcement agency" means an agency that consists of one or more persons employed by the federal government, including any agency described under 18 USC 926C (e) (2); a state, or a political subdivision of a state; the U.S. armed forces; or the national guard, that has as its purposes the prevention and detection of crime and the enforcement of laws or ordinances, and that is authorized to make arrests for crimes. See § 175.49(1)(f).

9. "Former law enforcement officer" is defined as follows in § 175.49(1)(d):

> "Former law enforcement officer" means a person who separated from service as a law enforcement officer at a state or local law enforcement agency in Wisconsin.

"Law enforcement officer" is defined as a person who is employed by a law enforcement agency for the purpose of engaging in, or supervising others engaging in, the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law and who has statutory powers of arrest. See § 175.49(1)(g).

"Law enforcement agency" means an agency that consists of one or more persons employed by the federal government, including any agency described under 18 USC 926C (e) (2); a state, or a political subdivision of a state; the U.S. armed forces; or the national guard, that has as its purposes the prevention and detection of crime and the enforcement of laws or ordinances, and that is authorized to make arrests for crimes. See § 175.49(1)(f).

10. "Licensee" is defined as follows in § 175.60(1)(d):

> "Licensee" means an individual holding a valid license to carry a concealed weapon issued under this section.

11. "Out-of-state licensee" is defined as follows in § 175.60(1)(g):

> "Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license.

1339 CARRYING A WEAPON BY LICENSEE WHERE PROHIBITED — § 175.60(16)

Statutory Definition of the Crime

Section 175.60(16) of the Wisconsin Statutes provides that it is unlawful for any (licensee) (out-of-state licensee) to knowingly carry (a concealed weapon) (a weapon that is not concealed) (a firearm that is not a weapon) in a place where carrying a weapon is prohibited.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was (a licensee) (an out-of-state licensee).

   ("Licensee" means an individual holding a valid license to carry a concealed weapon issued under section 175.60 of the Wisconsin Statutes.)[1]

   ("Out-of-state licensee" means an individual who is 21 years of age or over, who is not a Wisconsin resident, and who has been issued an out-of-state license to carry a concealed weapon.)[2]

2. The defendant knowingly carried (a concealed weapon) (a weapon that is not concealed) (a firearm that is not a weapon).

"Carried" means "went armed with."[3]

The phrase "went armed" means that the (weapon) (firearm) must have been either on the defendant's person or that the (weapon) (firearm) must have been within the defendant's reach.[4]

"Knowingly" requires that the defendant knew the (weapon) (firearm) was on (his) (her) person or within (his) (her) control.

["Concealed" means hidden from ordinary observation. The weapon does not have to be completely hidden.][5]

["Weapon" means (a handgun) (an electric weapon) (a knife other than a switchblade knife) (a billy club).][6]

FOR CASES INVOLVING "A FIREARM THAT IS NOT A WEAPON," ADD THE FOLLOWING.

["A firearm that is not a weapon" means a firearm other than a handgun.

"Firearm" means a device that acts by the force of gunpowder.][7]

3. The defendant carried the (concealed weapon) (weapon that was not concealed) (firearm that was not a weapon) in (specify a place listed in § 175.60(16)(a) 1. through 8.).[8]

Deciding About Knowledge

You cannot look into a person's mind to determine knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1339 was originally published as Wis JI-Criminal 5401 in 2012. It was renumbered and republished without substantive change in January 2024.

This instruction is for violations of § 175.60(16)(a), a statute created by 2011 Wisconsin Act 35. Effective date: November 1, 2011. The penalty is a fine of $500 or imprisonment for 30 days or both. See § 175.60(17)(b).

Note that this statute applies only to persons licensed to carry a concealed weapon by Wisconsin or by another state whose licensees are recognized in Wisconsin. Persons who are not licensees would be prosecuted under the regular criminal statutes, such as those prohibiting carrying a concealed weapon [§ 941.23] or carrying a firearm in a public building [§ 941.235].

Subsection (b) of § 175.60(16) provides that the "prohibitions under par. (a) do not apply to any of the following:

1. A weapon in a vehicle driven or parked in a parking facility located in a building that is used as, or any portion of which is used as, a location under par. (a).

2. A weapon in a courthouse or courtroom if a judge who is a licensee is carrying the weapon or if another licensee or out-of-state licensee, whom a judge has permitted in writing to carry a weapon, is carrying the weapon.

3. A weapon in a courthouse or courtroom if a district attorney, or an assistant district attorney, who is a licensee is carrying the weapon."

1. This is the definition of "licensee" provided in § 175.60(1)(d).

2. This is the definition of "out-of-state licensee" provided in § 175.60(1)(g), with the addition of the last phrase: "to carry a concealed weapon." "Out of state license" is defined in § 175.60(1)(f).

3. Section 175.60(1)(ag) defines "carry" as "to go armed with."

4. See footnote 4, Wis JI-Criminal 1335 for an explanation of the derivation of the definition of "went armed."

5. This is the definition of "concealed" used in Wis JI-Criminal 1335, Carrying A Concealed Weapon. It is to be included in the instruction only if the "concealed weapon" option is selected for the second element.

6. This is the definition of "weapon" provided in § 175.60(1)(j).

"Handgun" is defined as follows in § 175.60(1)(bm): ". . . any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of any explosive to expel a projectile through a smooth or rifled bore. 'Handgun' does not include a machine gun, as defined in s. 941.27(1), a short-barreled rifle, as defined in s. 941.28(1)(b), or a short-barreled shotgun, as defined in s. 941.28(1)(c)."

"Electric weapon" is defined in § 941.295(1c)(a).

7. Section 175.60(16)(a) refers to three categories of weapons: a concealed weapon; a weapon that is not concealed; and, a firearm that is not a weapon. "Weapon" is defined in § 175.60(1)(j) as a handgun, electric weapon, a knife other than a switchblade, or a billy club. "Handgun" is defined in § 175.60(1)(bm) to exclude machine guns and short-barreled rifles or shotguns. [See footnote 6, which contains the complete definition.] The latter would still qualify as firearms, because they operate by force of gunpowder. Thus, in the Committee's judgment, the statutory reference to "a firearm that is not a weapon" would include machine guns and short-barreled rifles or shotguns.

The definition of firearm is the standard one used in the instructions [see Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892)], modified to refer to "device" in place of the usual reference to "weapon."

8. Section 175.60(16)(a) prohibits carrying a weapon or a firearm that is not a weapon in the following places.

1. Any portion of a building that is a police station, sheriff's office, state patrol station, or the office of division of criminal investigation special agent of the department.
2. Any portion of a building that is a prison, jail, house of correction, or secured correctional facility.
3. The facility established under s. 46.055. [The secure mental health facility for sexually violent persons.]
4. The facility established under s. 46.056. [The Wisconsin Resource Center.]
5. Any secured unit or secured portion of a mental health institute under s.51.05, including a facility designated as the Maximum Security Facility at Mendota Mental Health Institute.
6. Any portion of a building that is a county, state, or federal courthouse.
7. Any portion of a building that is a municipal courtroom if court is in session.
8. A place beyond a security checkpoint in an airport.

1341A POSSESSION OF A MACHINE GUN OR OTHER FULL AUTOMATIC FIREARM — § 941.26(1)(a)

Statutory Definition of the Crime

Section 941.26(1)(a) of the Criminal Code of Wisconsin is violated by a person who possesses a machine gun or other full automatic firearm.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

   "Possessed" means that the defendant knowingly[2] had actual physical control of a firearm.[3]

Deciding About Knowledge[4]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge

2. The firearm was a [machine gun] [full automatic firearm].

   A [machine gun] [full automatic firearm] is any weapon that shoots automatically more than one shot, without manual reloading, by a single function

of the trigger.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1340A in 1996. It was renumbered Wis JI-Criminal 1341A in 2007. The 2007 revision involved the adoption of a new format and nonsubstantive changes to the text. The instruction was revised in 2009. The 2009 revision restored material in footnote 2 that was inadvertently dropped in 2007. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for a violation of § 941.26(1)(a). Possession of "any machine gun or other full automatic firearm" is prohibited. "Machine gun" is defined in § 941.27(1) in a way that includes any full automatic firearm. Thus, the instruction can be used with reference to either "machine gun" or "full automatic firearm," depending on the way the offense is charged. Both terms are defined in the same way.

Note that there are several exceptions set forth in subsection (3) of § 941.26 and in subsection (2) of § 941.27. For example, "possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament or keepsake" is not prohibited. See, § 941.27(2). It is the Committee's judgment that statutory exceptions are best handled as follows. The question of whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. Section 941.26(1)(a) provides that "no person may sell, possess, use or transport any machine gun or other full automatic firearm." The instruction is drafted for a case involving "possession" because that appeared to the Committee to be the most likely charge and because "possess" is the most inclusive term.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical

control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. The Committee concluded that what is required for this offense is knowing possession of a firearm that is a machine gun or full automatic weapon, not knowledge that the firearm has characteristics that make it a machine gun or full automatic weapon. This is because § 941.26(1)(a) does not include any "intent words" that indicate knowledge of the nature of the weapon is required. See § 939.23(1). Note, however, that in interpreting federal statutes defining a similar offense, the United States Supreme Court concluded that knowledge of the nature of the weapon was required. In United States v. Staples, 511 U.S. 600 (1994), the court held that in a prosecution for violation 26 USC § 5861(d), the government "should have been required to prove beyond a reasonable doubt that [Staples] knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machine gun." The decision involved statutory construction; the court found that the language of the statute was not helpful because it is silent on "mens rea" and concluded:

> . . . absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.

The Committee concluded that Staples is not binding on the construction of the Wisconsin statute since federal statutes do not incorporate a rule regarding "intent words" like the one provided in § 939.23(1). Though not always consistent on this issue, Wisconsin appellate courts typically find that the absence of an "intent word" in a statute in the criminal code indicates legislative intent that no knowledge element is required. See, for example, State v. Stanfield, 105 Wis.2d 553, 560, 314 N.W.2d 339 (1982), interpreting what is now § 951.02, cruelty to animals; State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986), interpreting § 946.13, private interest in public contract; and, State v. Neumann, 179 Wis.2d 687, 708, 508 N.W.2d 54 (Ct. App. 1993), interpreting § 940.225(2)(a). However, a mental element has been read into criminal statutes outside the criminal code. See State v. Collova, 79 Wis.2d 473, 255 N.W.2d 581 (1977), adopting a mental element for operating after revocation, and State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973), adopting a knowledge element for controlled substance offenses.

The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 2, supra. The Committee concluded that sec. 941.26(1)(a) does not require proof that defendants know of the prohibition against possessing a machine gun. This conclusion is based on sec. 939.23(1)

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

5. This is based on the definition provided in § 941.27(1)(a). Subsections (b) and (c) of the same statute extend the definition to include the frame or receiver or other part designed for use in converting a weapon to an automatic one [sub. (b)] and to a combination of parts from which an automatic weapon could be assembled [sub. (c)]. The instruction obviously must be modified if one of those options is involved.

1341D POSSESSION OF OLEORESIN OF CAPSICUM (PEPPER SPRAY)[1] OR CS GEL BY A CONVICTED FELON — § 941.26(4)(L)

Statutory Definition of the Crime

Section 941.26(4)(L) of the Criminal Code of Wisconsin is violated by a person who possesses a device or container of (oleoresin of capsicum)[2] (CS gel)[3] and has been convicted of a felony.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a device or container.

   "Possess" means that the defendant knowingly[4] had actual physical control of a device or container.[5]

Deciding About Knowledge[6]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The device or container contained (oleoresin of capsicum) (CS gel).[7]

3. The defendant had been convicted of a felony before (date of offense).[8]

(Name of felony) is a felony in Wisconsin.[9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1341B in 1995. It was revised and renumbered as Wis JI-Criminal 1341D in 2007. The instruction was revised in 2019. The 2019 revision reflected changes made by 2019 Wisconsin Act 52. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for an offense created by 1995 Wisconsin Act 25 [effective date: July 20, 1995]. Section 2 of 1995 Wisconsin Act 25 provides that it "first applies to the possession of a device or container on the effective date of this subsection, regardless of the date that the prior felony or crime, as described in section 941.26(4)(L) of the statutes, as created by this act, occurred." The statute does not apply if the person has received a pardon. § 941.26(4)(L).

The substance CS gel was added to the language of § 941.26 (4)(a) by 2019 Wisconsin Act 52 [effective date November 24, 2019].

Other offenses involving oleoresin of capsicum or CS gel are addressed in Wis JI-Criminal 1341B and 1341C.

1. The statute uses the term "oleoresin of capsicum" to refer to the substance commonly known as "pepper spray" or "pepper mace." It may help the understandability of the instruction if the common name is used, but the statutory term is used throughout this model. The full statutory description is "a device or container that contains a combination of oleoresin of capsicum or CS gel and inert ingredients but does not contain any other gas or substance that will cause bodily discomfort." § 941.26(4)(a).

2. See note 1, supra.

3. "'CS gel' means nonatomizing, gel-form chlorobenzalmalononitrile. § 941.26(1c)(a)."

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 4, supra. The Committee concluded that sec. 941.26(4)(L) does not require proof that defendants know of the prohibition against possessing the designated substances. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. Because the offense definition does not use the word "intentionally," the Committee concluded that knowledge that the device or container contained oleoresin of capsicum or CS gel is not required. Compare footnote 8 in Wis JI-Criminal 1341B.

8. The date of the offense should be inserted in this blank.

9. See note 7, Wis JI-Criminal 1343, which discusses the application of a similar statute to felony convictions from other states, stipulating to the fact of the felony conviction, and similar issues.

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1342 POSSESSION OF A SHORT-BARRELED SHOTGUN OR RIFLE[1] — § 941.28

Statutory Definition of the Crime

Section 941.28 of the Criminal Code of Wisconsin is violated by one who possesses a short-barreled (rifle) (shotgun).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a (rifle)[2] (shotgun).[3]

   "Possess" means that the defendant knowingly[4] had actual physical control[5] of a (rifle) (shotgun).

Deciding About Knowledge[6]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The (rifle) (shotgun) was short-barreled.[7]

   ["Short-barreled rifle" means a rifle having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches.][8]

["Short-barreled shotgun" means a shotgun having one or more barrels having a length of less than 18 inches measured from closed breech or bolt face to muzzle or a shotgun having an overall length of less than 26 inches.][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1342 was originally published in 1983 and revised in 1985, 1987, 1995, and 2007. The 2007 revision involved the adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

In State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), the court held that § 941.28 applies to a shotgun whose firing pin has been removed. The court noted its agreement with the trial court's conclusion that the statute does not require "that the shotgun be capable of being fired at the time it was possessed." 171 Wis.2d 175, 178.

1. This instruction is for a violation of § 941.28, created by Chapter 115, Laws of 1979 (effective date May 1, 1979). The statute prohibits not only "possession" but also "selling," "offering to sell," "transporting," "purchasing," or "going armed with" a short-barreled rifle or shotgun. The instruction is written in terms of "possession" because the Committee concluded that "possession" would be the most commonly charged type of offense. Further, "possession" is a broad enough term to cover most of the other prohibited activities; one must possess something in order to transport it, or to sell it, or to go armed with it.

2. "Rifle" is defined by § 941.28(1)(a):

> "Rifle" means a firearm designed or redesigned, made or remade, and intended to be fired from the shoulder or the hip and designed or redesigned and made or remade to use the energy of a propellant in a metallic cartridge to fire through a rifled barrel a single projectile for each pull of the trigger.

3. "Shotgun" is defined by § 941.28(1)(d):

> "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder or the hip and designed or redesigned and made or remade to use the energy of a propellant in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 4, supra. The Committee concluded that sec. 941.28 does not require proof that defendants know of the prohibition against possessing a short-barreled rifle or shotgun. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. The statutory definitions of "rifle" and "shotgun" require that it be "designed or redesigned, made or remade, and intended to be fired from the shoulder or hip. . . ." The weapon that is the subject of a charge covered by this instruction must have originally been "intended to be fired from the shoulder or hip" and later modified to be "short-barreled." The weapon so modified need not be "intended to be shot from the shoulder or hip."

The court of appeals reached a conclusion consistent with this analysis in State v. Johnson, supra at 182.

> . . . the pertinent intent is that of the fabricator and not that of the possessor. . . Thus, a weapon is within the scope of section 941.28(1)(d) if it was either "designed" or "redesigned" and either "made" or "remade" "to be fired from the shoulder or hip" and intended by the designer or redesigner and the maker or remaker to be so operated.

The Johnson court rejected the argument that "the statute's prohibition could be defeated by the possessor's

professed subjective intent to not fire the weapon from his or her shoulder or hip." 171 Wis.2d 175, 183.

Because the offense definition does not use the word "intentionally," the Committee concluded that knowledge that the rifle or shotgun was short-barreled is not required.

8. This is the definition provided in § 941.28(1)(b).

9. This is the definition provided in § 941.28(1)(c).

1343 POSSESSION OF A FIREARM [BY AN ADULT CONVICTED OF A FELONY][1] — § 941.29(1m)

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person has been convicted of a felony.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

"Firearm" means a weapon which acts by the force of gunpowder.[3]

[It is not necessary that the firearm was loaded or capable of being fired.][4]

"Possess" means that the defendant knowingly[5] had actual physical control of a firearm.[6]

Deciding About Knowledge[7]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his or her possession, even though another person may also have similar control.]

2. The defendant had been convicted of a felony before (date of offense).[8]

[(Name of felony) is a felony in Wisconsin.][9]

[The parties have agreed that the defendant was convicted of a felony before (date of offense) and you must accept this as conclusively proved.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1343 was originally published in 1983 and revised in 1984, 1986, 1987, 1993, 1996, 1999, 2007, 2011, 2016, and 2019. This revision was approved by the Committee in February 2021; it added to the Comment. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a

prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in new sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 199, 556 N.W.2d 701 (1996) is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1343D for violations of § 941.29(1m)(bm) through (em), possession of a firearm by a person who has been adjudicated delinquent for an act that would be a felony if committed by an adult in the state, found not guilty of a felony due to mental disease or defect, found not guilty or not responsible for a felony in another jurisdiction due to insanity or mental disease, defect, or illness, committed for treatment under s. 51.20 (13) (a) and ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 2007 stats., or who has been ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 51.45 (13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or overbroad and it does not deny the equal protection of the laws. Id.

Wisconsin's possession of a firearm by a felon law is not unconstitutional as applied to a defendant convicted of a non-violent felony. The Wisconsin Supreme Court has held that prohibiting all felons from possessing firearms under § 941.29, even those convicted of non-violent offenses is substantially related to the important governmental objectives of public safety and the prevention of gun violence. State v. Roundtree, 2021 WI 1, 395 Wis.2d 94, 952 N.W.2d 765. Accordingly, § 941.29 is constitutional as applied to all felons, regardless of the nature or age of the underlying felony conviction. Id.

Section 2 of Chapter 141, Laws of 1981, related to the applicability of the law and was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29 that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court

concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to adults who are prohibited from possessing firearms because of a previous felony conviction. The bracketed language "by an adult felon" is optional and can be included to distinguish between individuals who are prohibited from possessing firearms under § 941.29(1m)(a) and (b) due to being an adult convicted of a felony, and other groups of people who are prohibited from possessing firearms, such as those who have been adjudicated delinquent, found not guilty of a felony by reason of mental illness or defect, or are subject to an injunction.

2. The instruction is drafted for cases involving possession of a firearm by a person convicted of a felony. However, the statute also applies to other categories of individuals. See § 941.29(1m)(a) through (g). This instruction is suitable for use in cases involving subs. (1m)(a) and (b). (See discussion in note 7.) For cases involving subs. (1m)(bm) through (em), see Wis JI-Criminal 1343D. For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29. The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest." However, § 925(c), and by extension (5)(b), no longer provide a functional mechanism for relief from the firearms disability imposed on felons in Wisconsin. This is because "since 1992, Congress has provided in each ATF appropriations bill that none of the appropriated funds are to be used to investigate or act upon applications for relief from federal firearms disabilities." Moran v. Wisconsin Department of Justice, 2019 WI App 206, ¶19, 388 Wis. 2d 193, 932 N.W.2d 430.

Subsection (5)(a) contains two prerequisites for lawful possession of a firearm by a felon: the individual must have received a pardon, and they must have been expressly authorized to possess a firearm under 18 U.S.C. app 1203. However, it is important to note that the latter requirement was repealed in 1986. Moran, 388 Wis. 2d 193, ¶17. Wisconsin law distinguishes between a pardon and a restoration of rights. A pardon alone will restore a felon's firearm rights. Id. ¶¶ 23-26. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

4. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

6. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

7. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 5, supra. The Committee concluded that subsections (1m)(a) through (g) do not require proof that defendants know their enumerated status or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute. In the context of Wis. Stat. § 941.29(1m), the absence of the intent word "knowingly" is particularly significant, indicating that proof of intent is not required. See also State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), which concluded that the statute requiring sentencing courts to inform defendants convicted of felonies about the prohibition on firearm possession did not create an extra element for the crime of illegal firearm possession by a felon.

8. The date of the offense should be inserted in this blank.

9. The statute applies to persons convicted of a felony in Wisconsin and also to persons convicted of crimes in other states that would be felonies in Wisconsin. In the Committee's judgment, the way the second element is phrased should be suitable for handling either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a

federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

Where the out-of-state conviction is under a statute that is broader than its Wisconsin counterpart, courts should evaluate whether the conduct that led to the conviction would be considered a felony if committed in Wisconsin. If it would, the out-of-state conviction can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, ¶¶7-6, 642 N.W.2d 230.

10. Defendants may offer to stipulate to the fact of their felon status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**. The effect of a stipulation in a prosecution for violating § 941.29 has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of felon in possession of a firearm is that you have been convicted of a felony before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that you have been convicted of a felony before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that you have been convicted of a felony before the date of this offense?

4. Do you understand that with this stipulation, you are agreeing that I tell the jury that you have been convicted of a felony before the date of this offense and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands (his) (her) right to enter into this agreement regarding (his) (her) prior conviction or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

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1343D POSSESSION OF A FIREARM [OTHER CIRCUMSTANCES][1] — § 941.29(1m)(bm) – (em)

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person [CHOOSE ONE OF THE FOLLOWING][2]

[has been adjudicated delinquent for an act that, if committed by an adult in Wisconsin, would be a felony.]

[has been found not guilty of a felony in Wisconsin by reason of mental disease or defect.]

[has been found (not guilty of) (not responsible for) a crime elsewhere that would be a felony in Wisconsin by reason of (insanity) (mental disease, defect, or illness).]

[has been committed for treatment under Wis. Stat. § 51.20 (13) (a) and is subject to an order not to possess a firearm under § 51.20 (13) (cv) 1.]

[is subject to an order not to possess a firearm under § (51.20 (13) (cv) 1.) (51.45(13) (i) 1.) (54.10 (3) (f) 1.) (55.12 (10) (a)).][3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

"Firearm" means a weapon which acts by the force of gunpowder.[4]

[It is not necessary that the firearm was loaded or capable of being fired.][5]

"Possess" means that the defendant knowingly[6] had actual physical control of a firearm.[7]

Deciding About Knowledge[8]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in their possession, even though another person may also have similar control.]

2. The defendant, [CHOOSE ONE OF THE FOLLOWING].[9]

[before (date of offense), had been adjudicated delinquent for an act that would

be a felony in Wisconsin if committed by an adult.[10]

(Name of act), if committed by an adult in this state, would be a felony.)]

[before (date of offense), had been found not guilty of a felony in Wisconsin due to mental disease or defect.][11]

[before (date of offense), had been found (not guilty of) (not responsible for) a crime elsewhere, which would be a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness).[12]

(Name of felony) is a felony in Wisconsin.][13]

[had been committed for treatment under Wis. Stat. § 51.20 (13) (a) and was subject to an order not to possess a firearm under § 51.20 (13) (cv) 1. on (date of offense)][14]

[was subject to an order not to possess a firearm under § (51.20 (13) (cv) 1.) (51.45(13) (i) 1.) (54.10 (3) (f) 1.) (55.12 (10) (a)) on (date of offense)][15]

[The parties have agreed that [CHOOSE ONE OF THE FOLLOWING], and you must accept this as conclusively proved.][16]

[before (date of offense), the defendant was adjudicated delinquent for an act that would be a felony in Wisconsin if committed by an adult]

[before (date of offense), the defendant was found not guilty of a felony in Wisconsin due to mental disease or defect]

[before (date of offense), the defendant was found (not guilty of) (not

responsible for) a crime elsewhere, which would be a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)]

[on (date of offense), the defendant was committed for treatment under s. 51.20 (13) (a) and was subject to an order not to possess a firearm]

[on (date of offense), the defendant was subject to an order not to possess a firearm under § 51.20 (13) (cv) 1., 51.45(13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 1343D was approved by the Committee in August 2023.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m). In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in the new sub. (1g). [The effective date of Act 109 is November 13, 2015, but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

See Wis JI-Criminal 1343 for violations § 941.29(1m) possession of a firearm by a person convicted of a felony.

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996) is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or overbroad, and it does not deny the equal protection of the laws. Id.

Wisconsin's possession of a firearm by a felon law is not unconstitutional as applied to a defendant convicted of a non-violent felony. The Wisconsin Supreme Court has held that prohibiting all felons from possessing firearms under § 941.29, even those convicted of non-violent offenses is substantially related to the important governmental objectives of public safety and the prevention of gun violence. State v. Roundtree, 2021 WI 1, 395 Wis.2d 94, 952 N.W.2d 765. Accordingly, § 941.29 is constitutional as applied to all felons, regardless of the nature or age of the underlying felony conviction. Id.

Section 2 of Chapter 141, Laws of 1981, is related to the applicability of the law. However, it was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29 that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to individuals who are prohibited from possessing firearms because they were adjudicated delinquent or found not guilty of a felony by reason of mental illness or defect. The bracketed language "other circumstances" is optional and can be included to distinguish between those individuals restricted from firearm possession under § 941.29(1m)(bm) - (em) and other types of individuals who are also banned from possessing firearms, such as adult felons or persons subject to an injunction at the time of the offense.

2. The applicable term should be selected. The alternatives are those provided in sub. (1m)(bm) – (em) of § 941.29.

3. This instruction is drafted to address cases concerning the possession of a firearm by an individual falling under one of the categories provided in subs. 941.29(1m)(bm) through (em). [Subsection (1m)(em)

was created by 2009 Wisconsin Act 258.] It is important to note that the statute extends to other categories of individuals as well. See § 941.29(1m)(a) through (g). For cases involving possession of a firearm by a person convicted of a felony, see Wis JI-Criminal 1343. That instruction is also suitable for use in cases involving subs. (1m)(a) and (b). For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29. The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest." However, § 925(c), and by extension (5)(b), no longer provide a functional mechanism for relief from the firearms disability imposed on felons in Wisconsin. This is because "since 1992, Congress has provided in each ATF appropriations bill that none of the appropriated funds are to be used to investigate or act upon applications for relief from federal firearms disabilities." Moran v. Wisconsin Department of Justice, 2019 WI App 206, ¶19, 388 Wis. 2d 193, 932 N.W.2d 430.

Subsection (5)(a) contains two prerequisites for lawful possession of a firearm by a felon: the individual must have received a pardon, and they must have been expressly authorized to possess a firearm under 18 U.S.C. app 1203. However, it is important to note that the latter requirement was repealed in 1986. Moran, 388 Wis. 2d 193, ¶17. Wisconsin law distinguishes between a pardon and a restoration of rights. A pardon alone will restore a felon's firearm rights. Id. ¶¶ 23-26. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

An individual who has been adjudicated delinquent for a felony, as defined in Wis. Stat. § 941.29(1m)(bm), has the option to petition for the restoration of their firearm possession rights under Wis. Stat. § 941.29(8). That section provides the following:

> This section does not apply to any person specified in sub. (1m)(bm) if a court subsequently determines that the person is not likely to act in a manner dangerous to public safety. In any action or proceeding regarding this determination, the person has the burden of proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety.

To initiate this process, individuals can make use of a specific court form called the "Petition for Removal of Firearm Restriction" (JD-1771).

4. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

6. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

7. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

8. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 6, supra. The Committee concluded that subsections (1m)(bm) through (em) do not require proof that defendants know their enumerated status or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute. In the context of Wis. Stat. § 941.29(1m), the absence of intent word "knowingly" is particularly significant, indicating that proof of intent is not required. See also, State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), which concluded that the statute requiring sentencing courts to inform defendants convicted of felonies about the prohibition on firearm possession did not create an extra element for the crime of illegal firearm possession by a felon.

9. The applicable term should be selected. The alternatives are those provided in sub. (1m)(bm) – (em) of § 941.29.

10. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(bm) for the complete language.

11. See § 941.29(1m)(c)

12. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(d) for the complete language.

13. The statute applies to persons found not guilty of a felony in Wisconsin by reason of mental disease or defect and also persons found not guilty of or not responsible for a crime by reason of insanity or mental disease, defect, or illness in another state that would be a felony in Wisconsin.

In the Committee's judgment, the way the second element is phrased should be suitable for handling

either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements "would be a felony if committed in this state."

14. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(e) for the complete language.

15. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(em) for the complete language.

Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

When an out-of-state criminal charge is based on a statute broader than its Wisconsin equivalent, courts should determine whether the underlying conduct resulting in the adjudication or finding of not guilty due to mental disease or defect would qualify as a felony under Wisconsin law. If it would, the out-of-state criminal conduct can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, ¶¶7-6, 642 N.W.2d 230.

16. Defendants may offer to stipulate to the fact of their adjudication status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**.

There is authority recognizing that defendants may offer to stipulate to the fact of a prior felony conviction when the charge is possession of a firearm by a felon under § 941.29(1m)(a). The effect of a stipulation in a prosecution for violating § 941.29(1m)(a) has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

The same concerns may lead to offers to stipulate to the fact of a prior adjudication addressed by this instruction. Care must be taken where a stipulation goes to an element of a crime. A waiver should be

obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of possession of a firearm by a person (adjudicated delinquent) (found not guilty of a felony in Wisconsin by reason of mental disease or defect) (subject to an order not to possess a firearm) is that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the State has proved beyond a reasonable doubt that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense?

3. Do you understand that the State has to convince each member of the jury that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense?

4. With this stipulation, you are agreeing that I tell the jury that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way or made any promises to you to get you

to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands their right to enter into this agreement regarding their (prior adjudication for an act considered a felony) (prior finding of not guilty of a felony charge due to mental disease or defect) (previously being subjected to an order that prohibits firearm possession) or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

1344 POSSESSION OF A FIREARM [BY A PERSON SUBJECT TO AN INJUNCTION][1] — § 941.29(1m)(f) or (g)

Statutory Definition of the Crime

Section 941.29 of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person is subject to (an injunction issued under (§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

   A firearm is a weapon which acts by the force of gunpowder.[3]

   [It is not necessary that the firearm was loaded or capable of being fired.][4]

   "Possess" means that the defendant knowingly[5] had actual physical control of a firearm.

Deciding About Knowledge[6]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the

facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.[7]

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in his or her possession, even though another person may also have similar control.]

2. The defendant was subject to (an injunction issued under (§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before (date of offense).[8]

An injunction is a court order prohibiting specified conduct.[9]

[The parties have agreed that an injunction was issued to the defendant under subsection ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before (date of offense) and you must accept this as conclusively proved.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1344 was originally published in 1996 and revised in 2008, 2015, and 2018. The 2018 revision made changes in the comment and non-substantive changes in the text. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m); the instruction was revised in 2016 to reflect that change. In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a "violent felony" or a "violent misdemeanor." Those terms are defined in sub. (1g). [The effective date of Act 109 is November 13, 2015; but § 941.29(4m)(b) states: "This subsection does not apply to sentences imposed after July 1, 2020."]

This instruction is for a violation of § 941.29(1m)(f) or (g) – by a person subject to an injunction. It is modeled after Wis JI-Criminal 1343, Possession of a Firearm, defined by § 941.29(1m)(a).

See Wis JI-Criminal 1343D for violations of § 941.29(1m)(bm) through (em), possession of a firearm by a person who has been adjudicated delinquent for an act that would be a felony if committed by an adult in the state, found not guilty of a felony due to mental disease or defect, found not guilty or not responsible for a felony in another jurisdiction due to insanity or mental disease, defect, or illness, committed for treatment under s. 51.20 (13) (a) and ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 2007 stats., or who has been ordered not to possess a firearm under s. 51.20 (13) (cv) 1., 51.45 (13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).

Section 941.29(4)(f) applies to persons enjoined under § 813.12 (domestic abuse) and § 813.122 (child abuse) and to an injunction or order "issued by a tribal court under a tribal domestic abuse ordinance adopted in conformity with this section." § 813.12(1)(e). The tribal injunction must include notice that the respondent is subject to the requirements and penalties of § 941.29. Section 941.29(4)(g) applies to persons ordered not to possess a firearm under § 813.123(5m) (vulnerable adult injunctions) or § 813.125(4m) (harassment injunctions). Those statutes require specific findings to support the firearm prohibition.

Note that there are several exceptions set forth in subsections (5) through (10) of § 941.29. See note 1, Wis JI-Criminal 1343, Possession Of A Firearm.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to individuals who are prohibited from possessing firearms because they were subject to an injunction on the date of the offense. The bracketed language "by a person subject to an injunction" is optional and can be included to distinguish between those individuals restricted from firearm possession under § 941.29(1m)(f) or (g) and other types of individuals who are also banned from possessing firearms, such as those who have been adjudicated delinquent, found not guilty of a felony by reason of mental illness or defect, or are adult felons.

2. Here, select the number of the statute under which the injunction or order was issued. All injunctions issued under §§ 813.12 and 812.122 include a prohibition against possession of a firearm. A tribal injunction that satisfies § 813.12(1(e) is covered if it "includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128(3g)." § 941.29(1m)(f). Injunctions under §§ 813.123 and § 813.125 may include an order prohibiting firearm possession if a specific finding is made by the court. See § 813.123(5m) and § 813.125(4m).

3. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892). This definition excludes air guns. See note 3, Wis JI-Criminal 1305.

4. Volume V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 83 (February 1953).

Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

6. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 5, supra. The Committee concluded that subsections (1m)(f) and (g) do not require proof that defendants know they were subject to an injunction or order or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1)

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

7. The definition of "possess" is the one provided in Wis JI-Criminal 920. See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that "handling" a firearm was sufficient to satisfy the "possession" element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

8. Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who "knowingly" violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.CT. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

Section 941.29(1m)(f) provides the following:

> The person is subject to an injunction issued under s. 813.12 or 813.122 or under a tribal injunction, as defined in s. 813.12 (1) (e), issued by a court established by any federally recognized Wisconsin Indian tribe or band, except the Menominee Indian tribe of Wisconsin, that includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128 (3g). [Emphasis added.]

Based on the language of this subsection, the Committee believes that the notice provision is exclusively applicable to tribal injunctions. Circuit court orders under sections 813.12 and 813.122 have explicit notice requirements concerning section 941.29. Conversely, tribal injunctions may not have the same requirement. Given that a tribal injunction must fulfill certain criteria, such as originating from a federally recognized Wisconsin tribe (excluding Menominee), containing notice regarding the requirements and penalties outlined in section 941.29, and being filed in the circuit court, it is logical to ensure that a respondent receives actual notice regarding the requirements and penalties specified in § 941.29(1m)(f) for a tribal injunction. This interpretation aligns with the original enactment of this provision in 1995 and subsequent amendments over the years. It has consistently been the case that the later provisions, including the notice requirement, have always been applicable to tribal injunctions.

9. This is the definition of "injunction" used in Wis JI-Criminal 2040.

10. Defendants may offer to stipulate to the fact of an injunction having been issued under § 813.12 or § 813.122 or under a tribal injunction, as defined in § 813.12 (1) (e). The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, AGREED FACTS.

There is authority recognizing that defendants may offer to stipulate to the fact of a prior felony conviction when the charge is possession of a firearm by a felon under § 941.29(1m)(a). The effect of a stipulation in a prosecution for violating § 941.29(1m)(a) has been described as follows:

> . . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister's crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The same concerns may lead to offers to stipulate to the fact of an injunction having been issued under the subsection addressed by this instruction. Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of possession of a firearm by a person subject to an injunction is that an injunction was issued to you under subsection ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) before the date of this offense?

2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that an injunction issued to you before the date of this offense?

3. Do you understand that the State has to convince each member of the jury that an injunction was issued to you before the date of this offense?

4. Do you understand that with this stipulation, you are agreeing that I tell the jury that an injunction under ((§ 813.12) (§ 813.122)) (a tribal injunction) (an order not to possess a firearm issued under (§ 813.123(5m)) (§ 813.125(4m)) was issued to you before the date of this offense, and that they are to accept this fact as conclusively proved?

5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?

6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?

8. Are you entering into this agreement of your own free will?

9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands (his) (her) right to enter into this agreement regarding an injunction being issued to (him) (her) before the date of this offense or to not enter into this agreement?

2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not

formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

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1344A POSSESSION OF AN ELECTRIC WEAPON — § 941.295

Statutory Definition of the Crime

Section 941.295 of the Criminal Code of Wisconsin is violated by a person who possesses an electric weapon.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a device.

"Possessed" means that the defendant knowingly[2] had actual physical control of a device.[3]

Deciding About Knowledge[4]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The device was an electric weapon.

An electric weapon is any device that is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published in 2010 and revised in 2011. The 2011 revision updated the Comment to reflect changes made by 2011 Wisconsin Act 35. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

Note that there are several exceptions set forth in subsection (2) of § 941.295. In the Committee's judgment, statutory exceptions are best handled as follows. The question of whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

A second set of exceptions was created by 2011 Wisconsin Act 35:

> (2g) The prohibition in sub. (1m) on possessing or going armed with an electric weapon does not apply to any of the following:
>
> (a) A licensee or an out-of-state licensee.
> (b) An individual who goes armed with an electric weapon in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies.

Section 941.295(1c)(b) provides that "'licensee' has the meaning given in s. 175.60(1)(d)," which is: ". . . an individual holding a valid license to carry a concealed weapon issued under this section." Section 941.295(1c)(c) provides that "out-of-state licensee" has the meaning given in s. 175.60(1)(g).

1. Section 941.295(1m) applies to "whoever sells, transports, manufactures, possesses, or goes armed with any electric weapon." The instruction is drafted for a case involving "possession" because that appeared to the Committee to be the most likely charge and because "possess" is the most inclusive term.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). The Committee concluded that knowledge of the characteristics that make the weapon an electric weapon is not required. For an analogous situation, see Wis JI-Criminal 1341A, Possession Of

A Machine Gun, note 2.

3. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

4. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 2, supra. The Committee concluded that sec. 941.295 does not require proof that defendants know of the prohibition against possessing an electric weapon. This conclusion is based on sec. 939.23(1)

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

5. This is the definition provided in § 941.295(1c)(a).

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1400C DAMAGE OR THREAT TO PROPERTY OF A WITNESS — § 943.011

Statutory Definition of the Crime

Section 943.011 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property owned by a person who is or was a witness by reason of the owner having attended or testified as a witness and without the owner's consent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to total destruction.[1]

   IF THE CASE INVOLVES CAUSING DAMAGE, ADD THE FOLLOWING:

   ["Cause" means that the defendant's conduct was a substantial factor in producing damage.][2]

   IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][3]

2. (Name of victim) was a witness.

["Witness" means any person who has attended a proceeding to testify or who has testified.][4]

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant (caused) (threatened to cause) damage to physical property owned by (name of victim) because[5] the person attended or testified as a witness.

4. The defendant (caused) (threatened to cause) damage to the property without the consent[6] of (name of victim).

5. The defendant acted intentionally.[7] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by (name of victim), or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.[8]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1400C was originally published in 1998 and revised in 2004 and 2020. The 2004 revision involved adoption of a new format, adding a definition of "true threat," and nonsubstantive changes in the text. The instruction was previously designated as Wis JI-Criminal 1400B and was renumbered JI 1400C in 2020. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

This instruction is for violations of § 943.011(2)(a), which was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Causing criminal damage to the property of a witness was formerly addressed by increasing the penalty for violations of § 943.01, Criminal Damage To Property. Act 143 deleted reference to witnesses from § 943.01 and expanded the scope of the statute by including threats to damage property and, in sub. (2)(b), threats to cause and causing of damage to property owned by family members of a witness. If damage to the property of a family member of a witness is involved, the instruction must be modified.

1. The definition of "damage" is the one provided in Wis JI-Criminal 1400, Criminal Damage To Property. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

2. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

> There may be more than one cause of damage. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also, see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

4. The definition of "witness" in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 943.011. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

> (3) "Witness" means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

5. The instruction uses "because" in place of the statutory language "by reason of . . ." The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if "because" is used.

6. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

7. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.207, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

8. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1402A CRIMINAL DAMAGE OR THREAT TO PROPERTY OF A JUDGE — § 943.013

Statutory Definition of the Crime

Section 943.013 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property that belongs to a (judge) (family member of a judge) where at the time of the (act) (threat), the person knows[1] that the person whose property is (damaged) (threatened) is a (judge) (family member of a judge), [the judge is acting in an official capacity] [the (act) (threat) is in response to an action taken in the judge's official capacity],[2] and there is no consent by the person whose property is (damaged) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to total destruction.[3]

   IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

   [A "threat" is an expression of intention to do harm and may be communicated

orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][4]

2. (Name of victim) was a (judge) (family member of a judge).

   [For the purpose of this offense, a (e.g., circuit court judge) is a judge.][5]

   [For the purpose of this offense, a (e.g., child) is a family member.][6]

3. At the time of the (act) (threat), the defendant knew[7] that (name of victim) was a (judge) (family member of a judge).

4. [The judge was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the judge's official capacity.][8]

   Judges act in an official capacity if they perform duties that they are employed[9] to perform. A judge who performs acts that are not within the responsibilities of a judge does not act in an official capacity.[10] (The duties of a judge include: _____.)[11]

5. The defendant (caused) (threatened to cause) damage to the property without the consent[12] of (name of victim).

6. The defendant acted intentionally.[13] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by

(name of victim), or was aware that his or her conduct was practically certain to cause that result and knew that (name of victim) did not consent.[14]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1403.1 in 1994. It was renumbered Wis JI-Criminal 1402A and revised in 1995, 2003, and 2004. The 2004 revision amended the definition of "true threat." This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 943.013 was created by 1993 Wisconsin Act 50 (effective date: November 25, 1993).

1. Neither the summary of the offense here nor the third element contains the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the judge's official capacity. That is, the threat or act must be committed either when the judge is acting in an official capacity or in response to an action taken in the judge's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the

instruction.

2. One of the alternatives in brackets should be selected.

3. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

4. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

5. Section 943.013(1)(b), as amended by 2001 Wisconsin Act 61, provides:

> "Judge" means a supreme court justice, court of appeals judge, circuit court judge, municipal judge, temporary or permanent reserve judge or circuit, supplemental, or municipal court commissioner.

The applicable term should be inserted in the blank.

6. Section 943.013(1)(a) provides:

> "Family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

7. See note 1, supra.

8. One of the alternatives in brackets should be selected.

9. "Employed" is used here in the general sense of being engaged in the performance of a duty.

10. The definition of "official capacity' is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

11. It may be helpful to set forth the applicable duty or responsibility here, which may be specifically set forth in statutes or case law.

12. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

13. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 943.013, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2) proper and the other facts that follow.

14. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

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1402B CRIMINAL DAMAGE OR THREAT TO PROPERTY OF A DEPARTMENT OF REVENUE EMPLOYEE — § 943.015

Statutory Definition of the Crime

Section 943.015 of the Criminal Code of Wisconsin is violated by one who intentionally (causes) (threatens to cause) damage to any physical property that belongs to a (Department of Revenue employee) (family member of a Department of Revenue employee) where at the time of the (act) (threat), the person knows[1] that the person whose property is (damaged) (threatened) is a (Department of Revenue employee) (family member of a Department of Revenue employee), [the Department of Revenue employee is acting in an official capacity], [the (act) (threat) is in response to an action taken in the Department of Revenue employee's official capacity],[2] and there is no consent by the person whose property is (damaged) (threatened).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (caused) (threatened to cause) damage to physical property that belonged to (name of victim).

   The word "damage" includes anything from mere defacement to

total destruction.[3]

IF THE CASE INVOLVES A THREAT, ADD THE FOLLOWING:

[A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.][4]

2. (Name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

[For the purpose of this offense, a (e.g., child) is a family member.][5]

3. At the time of the (act) (threat), the defendant knew[6] that (name of victim) was a (Department of Revenue employee) (family member of a Department of Revenue employee).

4. [The Department of Revenue employee was acting in an official capacity at the time of the (act) (threat).] [The (act) (threat) was in response to an action taken in the Department of Revenue employee's official capacity.][7]

Department of Revenue employees act in an official capacity if they perform duties that they are employed[8] to perform. A Department of Revenue employee

who performs acts that are not within the responsibilities of a judge does not act in an official capacity.[9] (The duties of a Department of Revenue employee include:_____.)[10]

5. The defendant (caused) (threatened to cause) damage to the property without the consent[11] of (name of victim).

6. The defendant acted intentionally.[12] This requires that the defendant acted with the mental purpose to (cause) (threaten to cause) damage to property owned by (name of victim), or was aware that his or her conduct was practically certain to cause that result and knew that (name of victim) did not consent.[13]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1403.2 in 1994. It was renumbered Wis JI-Criminal 1402B and revised in 1995, 2003, and 2004. The 2004 revised the definition of "true threat." This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

Section 943.015 was created by 1985 Wisconsin Act 29.

1. Neither the summary of the offense here nor the third element contains the alternative "or should have known" that is provided in the statute [see subsec. (2)(a)]. The Committee believed the phrase would be inapplicable in virtually all cases because a connection is required between the act or threat and the Department of Revenue employee's official capacity. That is, the threat or act must be committed either when the Department of Revenue employee is acting in an official capacity or in response to an action taken in the Department of Revenue employee's official capacity. In either situation, it may be confusing to instruct the jury on the "should have known" alternative. Of course, if that alternative fits the facts of the case, it should be added to the instruction.

2. One of the alternatives in brackets should be selected.

3. See Vol. V 1953 Judiciary Report on the Criminal Code, Wisconsin Legislative Council, page 97 (February 1953).

4. This definition is based on one of the descriptions of "true threat" in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. Perkins held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define "threat" as "true threat." This created an unacceptable risk that "the jury may have used the common definition of 'threat,' thereby violating the defendant's constitutional right to freedom of speech." 2001 WI 46, ¶43. The court stated: "The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower." 2001 WI 46, ¶43.

The following is the most complete definition of "true threat" offered by the court in Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

5. Section 943.015(1) provides:

"In this section, family member" means a parent, spouse, sibling, child, stepchild, foster child or treatment foster child.

The applicable term should be inserted in the blank.

6. See note 1, supra.

7. One of the alternatives in brackets should be selected.

8. "Employed" is used here in the general sense of being engaged in the performance of a duty.

9. The definition of "official capacity" is taken from Wis JI-Criminal 915. See the Comment to that instruction for further discussion.

10. It may be helpful to set forth the applicable duty or responsibility here, which may be specifically set forth in statutes or case law.

11. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

12. "Intentionally" requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923B.

"Intentionally" also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word "intentionally" in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 943.015, which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of "intentionally" does not carry over to the three facts set forth in (2)(a), through (b) and (c). Sub. (2)(a) has its own mental state – "knows or should know" – and thereby breaks the connection between "intentionally" used in sub. (2)

proper and the other facts that follow.

13. The requirement that the defendant know there is no consent is based on the definition of "intentionally" in § 939.23(3): ". . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.

1421 BURGLARY WITH INTENT TO STEAL[1] — § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to steal.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to steal.[7]

"Intent to steal" requires that the defendant had the mental purpose to take and carry away[8] movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.[9] [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.][10]

When Must Intent Exist?

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[11]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[12]

COMMENT

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1984, 1991, 1993, 1996, 2001, and 2020. The 2020 revision added to footnote 2 of the comment. This revision was approved by the Committee in December 2023; it updated footnote 10 to correct the referenced section in the statutory citation.

Criminal trespass to dwelling under § 943.14 is not a lesser included offense of burglary with intent to steal. Raymond v. State, 55 Wis.2d 482, 198 N.W.2d 351 (1972).

1. This instruction is drafted for burglary with the "intent to steal." If "intent to commit a felony" is charged, see Wis JI-Criminal 1424. For burglary offenses committed "while armed" or under other aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element and jury unanimity on finding guilt beyond a

reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful

possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m., and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
>
> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was "without consent" because of an "implied limitation on the scope of the invitation to enter":

> We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "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.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The problem of circumstantially proving intent to steal has received considerable attention from the Wisconsin Supreme Court. The present rule provides that while "intent to steal will not be inferred from the fact of entry alone," "'additional circumstances such as time, nature of the place entered, method of entry, identity of the accused and other circumstances, without proof of actual larceny, can be sufficient to permit a reasonable person to conclude the defendant entered with an intent to steal.'" State v. Barclay, 54 Wis.2d 651, 654, 196 N.W.2d 745 (1972), citing Strait v. State, 41 Wis.2d 552, 562, 164 N.W.2d 505 (1969). Also see State v. Holmstrom, 43 Wis.2d 465, 168 N.W.2d 574 (1969), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970), overruling State v. Kennedy, 15 Wis.2d 600, 113 N.W.2d 372 (1962). For a complete review of prior cases, see State v. Bowden, 93 Wis.2d 574, 288 N.W.2d 139 (1980).

8. The instruction uses "take and carry away" since it is the most common type of theft and the one that would most often be involved in a burglary case. In a proper case, the other alternatives in the theft statute ("use, transfer, conceal, or retain possession of . . .") should be substituted.

9. "Intent to deprive the owner permanently of possession" is used as the most common type of "intent to steal." It is possible that a burglary offense could involve mental states for other types of stealing. See, for example, theft under § 943.20(1)(b), which involves "intent to convert to his own use" and theft under § 943.10(1)(c), which requires intent to deprive a pledgee or other person having a superior right of possession.

10. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as "right to recapture," "claim of right," or "self-help," this defensive matter tends to negate either the "property of another" or the "knew it was property of another" elements. The rule applies to burglary, see State v. Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992), and is discussed at Wis JI-Criminal 710, Law Note: Right to Recapture.

11. Evidence of the defendant's possession of recently stolen property may often be offered to support a finding of intent to steal. If an instruction on the effect of such evidence is requested, see Wis

JI-Criminal 170, Circumstantial Evidence, and 173, Possession of Recently Stolen Property.

12. Burglary, as defined in § 943.10(1m), is punished as a Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

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1424 BURGLARY WITH INTENT TO COMMIT A FELONY[1] – § 943.10(1)

Statutory Definition of the Crime

Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building[2] without the consent of the person in lawful possession and with intent to commit a felony therein.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally entered a building.[3]
2. The defendant entered the building without the consent[4] of the person in lawful possession.[5]
3. The defendant knew that the entry was without consent.[6]
4. The defendant entered the building with intent to commit (state felony)[7], [that is, that the defendant intended to commit (state felony) at the time the defendant entered the building].[8]

   [IF THE JURY IS ALSO INSTRUCTED ON THE INTENDED FELONY, IT IS SUFFICIENT TO REFER TO THAT INSTRUCTION AND NOT REPEAT IT HERE.]

[IF THE INTENDED FELONY IS NOT CHARGED, DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.]

When Must Intent Exist?

The intent to commit a felony must be formed before entry is made. The intent to commit (state felony) which is an essential element of burglary is no more or less than the mental purpose[9] to commit (state felony) formed at any time before the entry, which continued to exist at the time of the entry.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.[10]

COMMENT

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1985, 1991, 1994, 1995, 1998, 2001, 2020, and 2021. The 2020 revision added to footnote 2 of the comment. The 2021 revision added footnote 7 to the comment. This revision was approved by the Committee in December 2023; it updated footnote 10 to correct the referenced section in the statutory citation. It also added to the comment.

1. This instruction is drafted for burglary with the "intent to commit a felony." If "intent to steal" is charged, see Wis JI-Criminal 1421. For burglary offenses committed "while armed" or under aggravating circumstances as prohibited by § 943.10(2), see Wis JI-Criminal 1425A, 1425B, and 1425C.

In State v. O'Neill, 121 Wis.2d 300, 359 N.W.2d 906 (1984), the Wisconsin Supreme Court held that ". . . the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge" under subsec. 943.10(1)(a). O'Neill involved a burglary charge against a campus police supervisor who allegedly conducted an illegal entry and search of an apartment. The theory of prosecution was that the illegal entry and search constituted misconduct in public office which could serve as the underlying felony for the burglary charge. The supreme court reversed the burglary conviction, holding that "misconduct in public office is not the type of felony contemplated by sec. 943.10(1)."

The text of the instruction has not been changed to accommodate the O'Neill decision because the Committee concluded that the question of whether a particular felony could form the basis for a burglary charge would be one of law for the trial court rather than one of fact for the jury.

In State v. Semrau, 2000 WI APP 54, 233 Wis.2d 508, 608 N.W.2d 376, the court applied O'Neill and concluded that bail jumping could be the intended felony upon which a burglary charge can be based.

"Felon in possession of a firearm" in violation of § 941.29 is a crime against persons or property and can be the basis for the intent to commit a felony element of burglary. State v. Steele, 2001 WI APP 34, ¶ 21, 241 Wis.2d 269, 625 N.W.2d 595.

2. The model instruction is drafted for a case involving entry into a "building." It must be modified if entry involved any of the other places listed in § 943.10(1)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of "building." The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that "a mobile home is a building." The court said this created a "mandatory conclusive presumption . . . regarding an element of the arson offense." However, the court further held that the error was harmless because it played no role in the jury's verdict:

> We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure

> to be a mobile home, as that term is commonly understood, this finding would be the 'functional equivalent' of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.01(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

> "[w]hile the circuit court could have used the phrase 'a room within a building' instead of the words 'office' or 'building,' the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used." Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 "identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f)." Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of "building" is necessary, resort to a standard dictionary may be helpful. For example, Webster's Ninth New Collegiate Dictionary provides that a "building" refers to "a usually roofed and walled structure built for permanent use (as for a dwelling)."

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break "and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony." The court held that the unfinished house was a "building" for purposes of burglary and defined the term as follows:

> . . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . "The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property."

69 Wis. 203, 206-07

A more recent case discusses "building" in connection with zoning rules prohibiting "mobile homes" but allowing "modular homes" and other buildings. The person's home had been mobile once, but at the

site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county's own definition of "building" and found that the home in question qualified:

> . . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m. and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

> The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.
>
> . . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was "without consent" because of an "implied limitation on the scope of the invitation to enter":

> We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word "intentionally" is used, "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.'" The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not "purport to be acting under legal authority," one of the alternatives to "no consent in fact" provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, supra, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. If multiple felonies are alleged, identify and define each felony. A defendant is not entitled to a unanimity instruction regarding the felonies that form the basis of their intent to enter a dwelling. In State

v. Hammer, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997) the court of appeals considered whether, in order to support a conviction for burglary, the jury had to be unanimous as to the predicate felony that the defendant intended to commit when entering a dwelling. The circuit court had instructed the jury that three different acts (first-degree sexual assault, armed robbery, and battery causing substantial bodily harm) were felonies but declined to instruct the jury that the verdict had to be unanimous as to the predicate felony that the defendant intended to commit. Id. at 217-18. Affirming Hammer's conviction, the court concluded that the language of Wis. Stat. § 943.10(1) "indicates that the crime is one single offense with multiple modes of commission." Id. at 220. Although there are different ways to satisfy the intent element of the crime of burglary, "the different ways do not create separate and distinct offenses." Id. at 220. Furthermore, the statute focuses on the intent to commit a felony, not any particular felony. Therefore, all the felonies are conceptually similar for the purposes of unanimity. Id. at 222.

8. The intent to commit the felony must exist at the time the defendant entered the place. It is not sufficient that the defendant formed an intent to commit the felony after entry. Such intent, however, is usually proved circumstantially by what defendant did after he entered the place.

Care must be taken to assure that the crime intended was a felony. In State v. Gilbertson, 69 Wis.2d 587, 230 N.W.2d 874 (1975), a burglary conviction was reversed because there was insufficient proof of intent to commit a felony. The underlying crime was alleged to be criminal damage to property which becomes a felony only if there is intent to reduce the property's value by the requisite felony level. The insufficiency of the evidence on this point required reversal.

A defendant's intention to endanger the safety of others through criminally reckless conduct is enough to satisfy element four's requirement that a defendant enter a building with the intent to commit a felony. See State v. Mays, 2022 WI App 24, 402 Wis.2d 162, 975 N.W.2d 649. In Mays, the Wisconsin Court of Appeals held the defendant's conviction for the crime of felony murder, with the underlying crime of armed burglary, predicated on his intent to commit second-degree recklessly endangering safety, was valid under Wisconsin law.

9. Under the Criminal Code, the phrase "with intent to" means that the defendant 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. Subsection 939.23(4) and Wis JI-Criminal 923A and 923B.

10. Burglary, as defined in § 943.10(1m), is punished as Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI-Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI-Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI-Criminal 1425C).

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1463 CARJACKING [TAKING A VEHICLE BY USE OR THREAT OF FORCE][1] — § 943.231(1)

Statutory Definition of the Crime

Subsection 943.231(1) of the Criminal Code of Wisconsin is violated by one who, while possessing a dangerous weapon and by the use of, or threat of the use of, force or the weapon against another, intentionally takes any vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took a vehicle[2] without the consent[3] of the owner.
2. The defendant knew that the owner did not consent to the taking.[4]
3. The defendant took the vehicle while possessing a dangerous weapon.
4. The defendant took the vehicle by the [(use) (threat of the use)][5] of [(force) (a dangerous weapon)] against another.

Meaning of Dangerous Weapon

A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any 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).[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1465 in 1994 and revised and renumbered as Wis JI-Criminal 1463 in June 2000. The instruction underwent another revision in 2003, which incorporated the modifications introduced by the 2001 Wisconsin Act 109. This revision was approved by the Committee in August 2023, it reflects changes made by 2023 Wisconsin Act 10 [effective date: May 12, 2023].

This instruction is for violations of § 943.231(1), which addresses the offense of carjacking. The 2003 revision deleted text presenting a special question asking whether death or great bodily harm was caused. 2001 Wisconsin Act 109 [effective date: February 1, 2003] repealed sub. (1m) which provided for an increased penalty in those situations while adding violations of § 943.231(1) as a possible predicate felony for felony murder under § 940.03. 2023 Wisconsin Act 10 [effective date: May 12, 2023] increased the penalty from a Class C felony to a Class B felony. It also reorganized the offenses commonly referred to as "carjacking" into a new statutory section titled "carjacking."

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. Prior to May 2023, this instruction was titled "Taking a Vehicle by Use or Threat of Force." However, with the enactment of 2023 Wisconsin Act 10, this offense was restructured and now falls under a new statutory section called "carjacking." Therefore, the accurate statutory title is "carjacking," but it might be helpful to include the bracketed language to distinguish this specific offense from other carjacking offenses.

2. For the definition of "vehicle," see § 939.22(44).

3. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking was without consent.

5. While the instruction recommends selecting the applicable alternative, the Committee did not conclude that the alternatives are so distinct that the election of one or other, or jury agreement on which alternative applies, should be required. This is similar to the result under the robbery statute, which this offense closely resembles. See Wis JI-Criminal 1479, footnote 1.

6. The definition of "dangerous weapon" is based on the one provided in § 939.22(10). The applicable alternative should be selected. See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to the definition of "dangerous weapon."

7. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly JI 923.1].

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1463A CARJACKING [TAKING A VEHICLE BY USE OR THREAT OF FORCE][1] — § 943.231(2)

Statutory Definition of the Crime

Subsection § 943.231(2) of the Criminal Code of Wisconsin is violated by one who by the use of, or threat of the use of, force against another, intentionally takes any vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant intentionally took a vehicle[2] without the consent[3] of (name of owner).
2. The defendant knew that (name of owner) did not consent to the taking of the vehicle.[4]
3. The defendant took the vehicle by the (use) (threat of the use) of force against another.

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements,

if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[5]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1463A was approved by the Committee in December 2018. This revision was approved by the Committee in August 2023, it reflects changes made by 2023 Wisconsin Act 10 [effective date: May 12, 2023].

This instruction is for violations of § 943.231(2) that provides: "Whoever, by use of force against another or by the threat of the use of force against another, intentionally takes any vehicle without the consent of the owner is guilty of a Class E felony." Section 943.23(1r) was created by 2017 Wisconsin Act 311 [effective date: April 18, 2018]. 2023 Wisconsin Act 10 [effective date: May 12, 2023] renumbered section 943.23(1r) as section 943.231(2). It also reorganized the offenses commonly referred to as "carjacking" into a new statutory section titled "carjacking."

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. Prior to May 2023, this instruction was titled "Taking a Vehicle by Use or Threat of Force." However, with the enactment of 2023 Wisconsin Act 10, this offense was restructured and now falls under a new statutory section called "carjacking." Therefore, the accurate statutory title is "carjacking," but it might be helpful to include the bracketed language to distinguish this specific offense from other carjacking offenses.

2. For a definition of "vehicle," see § 939.22(44).

3. See Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the taking was without consent.

5. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A.

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1466 INTENTIONALLY ACCOMPANYING A PERSON WHO OPERATES A VEHICLE WITHOUT THE OWNER'S CONSENT — § 943.23(4m)

Statutory Definition of the Crime

Subsection 943.23(4m) of the Criminal Code of Wisconsin is violated by one who knows that the owner does not consent to the driving or operation of a vehicle and intentionally accompanies, as a passenger in the vehicle, another person who intentionally drives or operates any vehicle without the consent of the owner.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. (Name of person)[1] intentionally (drove) (operated) a vehicle[2] without the consent[3] of the owner.[4]

   This requires that (name of person) acted with the purpose to (drive) (operate) a vehicle and knew that the owner did not consent to the (driving) (operation).[5]

   ["Drive" means to exercise physical control over the speed and direction of a vehicle while it is in motion.][6]

   ["Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it into motion.][7]

[A person (drives) (operates) without consent even though the owner consented to the original taking if the person (drives) (operates) the vehicle in a manner that goes beyond the scope of the use authorized or permitted by the owner.][8]

2. The defendant intentionally accompanied (name of person) as a passenger in the vehicle.

3. The defendant knew that the owner did not consent to the (driving) (operating) of the vehicle.[9]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.[10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1467.4 in 1994. It was revised in 2001 to renumber it as Wis JI-Criminal 1466 and to adopt a new format, make nonsubstantive changes to the text,

and update the comment. The instruction underwent another revision in 2016, which added to the text of element 1 at footnote 8. This revision was approved by the Committee in August 2023; it reflects changes made by 2023 Wisconsin Act 10 [effective date: May 12, 2023].

This offense, a Class A misdemeanor, is one of the so-called carjacking crimes created by 1993 Wisconsin Act 92 [effective date: Dec. 25, 1993]. It applies to one who accompanies a person who violates sub. (2), (3), or (3m) of § 943.23. The first two subsections are the previously existing "operating without the owner's consent" offenses. The instruction uses a violation of sub. (3) as the underlying offense: "intentionally drives or operates any vehicle without the consent of the owner. . ." That violation was selected because it was the simplest and required importing the fewest factual issues into the definition of this offense. Conduct that violates the other subsections will always violate sub. (3).

1. This blank and those that follow call for the name of the person who drove the vehicle and whom the defendant is charged with accompanying.

2. For a definition of "vehicle," see § 939.22(44).

3. If a definition of "without consent" is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that "without consent" means "no consent in fact" or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

4. The first element contains the elements for the direct violation of § 943.23(3), "intentionally driving or operating a vehicle without the consent of the owner." This is the simplest of the several different offenses that may serve as predicates for violations of § 943.23(4m). See the discussion preceding note 1, supra.

5. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the instruction requires knowledge that the driving or operating was without consent. In the context of this offense, the person actually driving or operating the vehicle must be shown to have had the required purpose and knowledge.

6. This is the definition of "drive" provided in § 943.23(1)(a).

7. This is the definition of "operate" provided by § 943.23(1)(c).

8. The sentence in brackets may be helpful if there is a question about whether a person who had consent to the original taking of the vehicle may be guilty of this offense. The Committee concluded that a person "drives or operates a vehicle without the owner's consent" where that person may have been lawfully in possession of a vehicle but operates it in a manner that goes beyond the scope of the use authorized or permitted by the owner. A complete explanation of this conclusion is provided in Wis JI-Criminal 1464, footnote 1.

9. When "intentionally" is used in a criminal statute, it requires, in addition to a mental purpose to cause the result specified, that "the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally.'" § 939.23(3). Thus, the

instruction requires knowledge that the driving or operating was without consent. In the context of this element, the defendant — who is charged with accompanying the driver or operator of the vehicle — must be shown to have had the required knowledge.

10. This is the shorter version used to describe the process of finding intent. The Committee concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A [formerly Wis JI-Criminal 923.1].

1532 INCEST: SEXUAL INTERCOURSE BETWEEN BLOOD RELATIVES — § 944.06)

Statutory Definition of the Crime

Incest, as defined in § 944.06 of the Criminal Code of Wisconsin, is committed by one who has nonmarital sexual intercourse with a person (he) (she) knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).

REFER TO WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.[1]

2. The defendant knew that (name of victim) was related to (him) (her) by blood.[2]

3. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.[3]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and

circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 1510 in 1983 and was revised in 1989. It was renumbered Wis JI-Criminal 1532 and revised in 2007. It was revised again in 2008, 2010, and 2021. The 2010 revision changed the definition of "sexual intercourse" as described in footnote 1. The 2021 revision added the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes to the comment. This revision was approved by the Committee in December 2023; it added the paragraph "Deciding About Knowledge" to the main text of the instruction.

Wis JI-Criminal 1510 was originally drafted to apply to incest offenses involving father and daughter. The 2007 revision revised it to apply generally to all "blood relatives" as provided by the statute.

Incest offenses involving children as victims are covered by a separate statute – see § 948.06, Incest With A Child, and Wis JI-Criminal 2130 and 2131.

1. 2009 Wisconsin Act 13 amended§ 944.06 to provide that "sexual intercourse" has the meaning provided in § 948.01(6). Wis JI-Criminal 2101B provides definitions for the alternatives presented by the statutory definition.

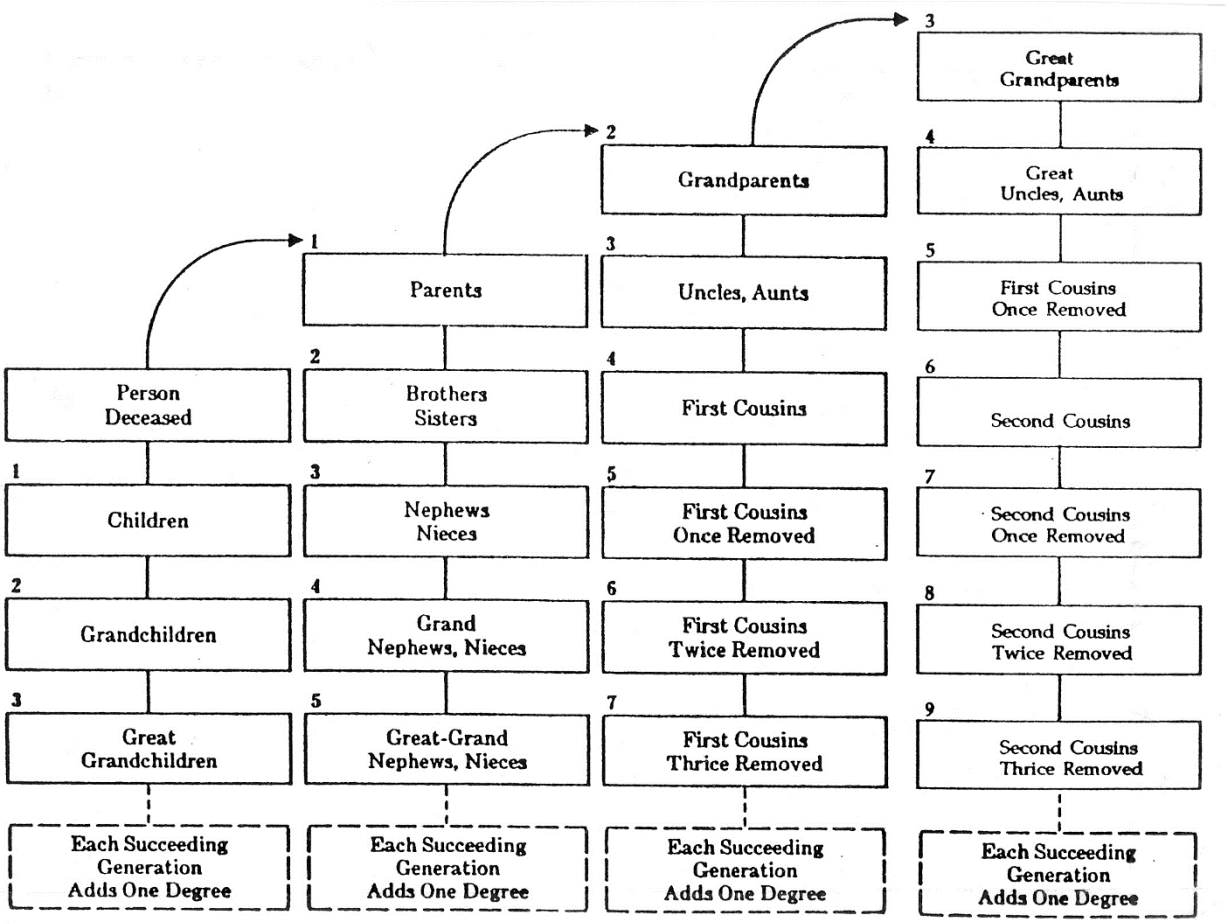
2. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are "related." The statute further requires that they be related "in a degree closer than second cousin," but the knowledge requirement apparently does not extend to the degree of relation.

3. This restates the requirement of the statutory definition that refers to "related in a degree within which the marriage of the parties is prohibited by the law of this state." Section 765.03 provides that "[n]o marriage shall be contracted . . . between persons who are nearer of kin than second cousins . . ." "Second cousin" is defined in Black's Law Dictionary (7th Edition) as follows: "A person related to another by descending from the same great-grandfather or great-grandmother." For a chart showing the degrees of kinship see § 990.001(16) and the Comment of Wis JI-Criminal 2130.

Degree of Kinship

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the

Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents' Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the degree of kinship of second cousins is indicated by the number "6." Thus, all those degrees indicated by the number "5" or less are "related in a degree closer than second cousin" and fall within the prohibition of s. 948.096(1).



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1535 PUBLIC FORNICATION: SEXUAL INTERCOURSE IN PUBLIC — § 944.15

Statutory Definition of the Crime

Public fornication, as defined in § 944.15 of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse in public.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name other person).

   "Sexual intercourse" means the penetration of the penis of the male into the genital organ of the female. Only vulvar penetration, however slight, is required. Emission of semen is not required.[1]

2. The alleged act of sexual intercourse took place in public.

   "In public" means in a place where other people are present or where other people can observe the act.[2]

3. The defendant knew or had reason to know the alleged act was observable by or in the presence of others.[3]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if

found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1535 was originally published in 1983 and revised in 1996, 2008, and 2016. The 2008 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in December 2023; it added the paragraph "Deciding About Knowledge" to the main text of the instruction.

This instruction is for the only remaining offense defined by § 944.15(2) sexual intercourse in public. An offense formerly covered by the same statute, sexual intercourse with a person 16 years old or older but younger than 18, is now defined in § 948.09, see Wis JI Criminal 2138.

Section 944.15 was created in roughly its present form by 1983 Wisconsin Act 17. The statute was revised by 1987 Wisconsin Act 332 to remove the offense involving minors to § 948.09. The statute reads as follows:

> 944.15 Public fornication.
> (1) In this section, "in public" means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual intercourse.
> (2) Whoever has sexual intercourse in public is guilty of a Class A misdemeanor.

1. The definition of "sexual intercourse" is adapted from that found in § 939.22(36). The definition of "sexual intercourse" in § 940.225(5)(b) applies only to sexual assaults under § 940.225; it does not apply to crimes defined in Chapter 944.

2. The definition of "in public" found in subsec. (1) of § 944.15, see above, appears to create two elements of this offense. One element is that the act take place in the presence of others or where observable by others. The second element is that the defendant know or have reason to know that the act is in the presence of or observable by others. Rather than lump the knowledge requirement in with the definition of "in public," the Committee decided it was preferable to treat it as a separate element.

The definition of "in public" used in the instruction is adapted from the statutory definition. No change in meaning is intended.

3. See note 2, supra.

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1537 SEXUAL GRATIFICATION IN PUBLIC — § 944.17(2)

Statutory Definition of the Crime

Sexual gratification, as defined in § 944.17(2) of the Criminal Code of Wisconsin, is committed by one who commits an act of sexual gratification in public involving the sex organ of one person and the mouth or anus of another.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed an act of sexual gratification with (name other person) involving the sex organ of one person and the (mouth) (anus) of another.[1]
2. The alleged act of sexual gratification took place in public.

   "In public" means in a place where other people are present or where other people can observe the act.[2]
3. The defendant knew or had reason to know the alleged act was observable by or in the presence of others.[3]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and

circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1537 was originally published in 1985 and revised in 1996, 1998, 2008, and 2020. This revision was approved by the Committee in December 2023; it added the paragraph "Deciding About Knowledge" to the main text of the instruction. Additionally, the statutory citation within the document was updated in accordance with the changes made by the 2019 Wisconsin Act 162.

This instruction is for the offense defined by § 944.17 — sexual gratification in public. Offenses involving acts of sexual gratification with a person younger than 18 were formerly covered by § 944.17(2)(b). That subsection was repealed by 1989 Wisconsin Act 332, which created Chapter 948, Crimes Against Children. Conduct formerly prohibited by § 944.17(2)(b) involving children under the age of 16 is likely to constitute sexual assault of a child under § 948.02. Offenses involving sexual gratification with an animal were formerly covered by § 944.17(2)(c) and (d). Those subsections were repealed by 2019 Wisconsin Act 162 [effective: March 5, 2020].

Section 944.17 was extensively revised by 1983 Wisconsin Act 17. Before the 1983 revision, § 944.17 (1981 82 Stat.) was titled "Sexual Perversion."

Section 944.17(3) was created by 1995 Wisconsin Act 165 to read: "Subsection (2) does not apply to a mother's breast-feeding of her child." [Effective date: April 6, 1996.]

1. "Sexual gratification" is not defined in the instruction or in the Wisconsin Criminal Code. Guidance as to its meaning may be gained from the context in which it is used in other statutes. See, for example, §§ 940.225 and 944.31.

For the purposes of this offense, it should not be relevant for whose "sexual gratification" the act was committed. Committing the act "in public" is the key fact making the conduct criminal.

2. "In public" is defined as follows in subsec. (1) of 944.17:

(1) In this section, "in public" means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual gratification.

This definition appears to create two separate elements. One element is that the act take place in the presence of others or where observable by others. The second element is that the defendant know or have reason to know that the act is in the presence of or observable by others. Rather than lump the knowledge requirement in with the definition of "in public," the Committee decided it was preferable to treat it as a separate element.

The definition of "in public" used in the instruction is adapted from the statutory definition. No change in meaning is intended.

3. See note 2, supra.

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1544A LEWD AND LASCIVIOUS BEHAVIOR: INDECENT ACT OF SEXUAL GRATIFICATION WITH ANOTHER — § 944.20(1)(a)

Statutory Definition of the Crime

Lewd and lascivious behavior, as defined in § 944.20(1)(a) of the Criminal Code of Wisconsin, is committed by one who commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant committed an act of indecent sexual gratification[1].

   This requires that the defendant's conduct offends the sense of decency of the community. It does not include conduct that is generally tolerated by the community at large, but that might disturb an overly sensitive person.

2. The defendant committed the act with another person.

3. The defendant committed the act with knowledge they were in the presence of others.

   This requires that the defendant knew or believed the act occurred in the presence of other persons.[2]

Deciding About Knowledge

You cannot look into a person's mind to find out knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1544A was approved by the Committee in December 2023.

This instruction is for the offense defined by § 944.20(1) — lewd and lascivious behavior — committing an indecent act of sexual gratification with another with knowledge that they are in the presence of others. For lewd and lascivious behavior — exposing genitals or pubic area, See Wis JI Criminal 1544B.

1. "Sexual gratification" is not defined in the instruction or in the Wisconsin Criminal Code. Guidance as to its meaning may be gained from the context in which it is used in other statutes. See, for example, §§ 940.225 and 944.31.

For the purposes of this offense, it should not be relevant for whose "sexual gratification" the act was committed.

2. This definition is adapted from the one provided for "in public" provided in §§ 944.15(1) and 944.17(1). Though that definition is not directly applicable to § 944.20, the Committee concluded that it was appropriate to refer to statutes in pari materia to define the common term.

1544B LEWD AND LASCIVIOUS BEHAVIOR: EXPOSING GENITALS OR PUBIC AREA — § 944.20(1)(b)

Statutory Definition of the Crime

Lewd and lascivious behavior, as defined in § 944.20(1)(b) of the Criminal Code of Wisconsin, is committed by one who publicly and indecently exposes genitals or pubic area.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant exposed (genitals) (pubic area).

   "Expose" means to exhibit to the view of another person or persons.

2. The defendant exposed (genitals) (pubic area) publicly, that is, not in a hidden manner, but open to view.

   ["Publicly" means in such a place or manner that the person knows or has reason to know that the conduct is observable by or in the presence of other persons.][1]

3. The defendant exposed (genitals) (pubic area) indecently.

   IF THE COURT FINDS IT IS NECESSARY TO DEFINE "INDECENTLY," ADD THE FOLLOWING

[This requires that the defendant's conduct offends the sense of decency of the community. It does not include conduct that is generally tolerated by the community at large but that might disturb an overly sensitive person.][2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1544B was originally published as Wis JI-Criminal 1544 in 1987 and revised in 1989, 1998, and 2007. The instruction was renumbered and republished without substantive change in December 2023.

This instruction was revised in 1989 to reflect a change made in § 944.20 by 1989 Wisconsin Act 31, (section 2828m). The terms "genitals or pubic area" were substituted for "sex organ." The effective date of the change was August 9, 1989.

Section 944.20(2) was created by 1995 Wisconsin Act 165 to read: "Subsection (1) does not apply to a mother's breast-feeding of her child." [Effective date: April 6, 1996.]

1. The definition of "publicly" is adapted from the one provided for "in public" in §§ 944.15(1) and 944.17(1). Though that definition is not directly applicable to § 944.20, the Committee concluded that it was appropriate to refer to statutes in pari materia to define the common term.

2. The Committee concluded that a dictionary definition of "indecently" would not be helpful. If description of what "indecently" requires is believed to be necessary, the Committee concluded that the jury should be guided in applying a community standard. The material suggested is adapted from the description of "otherwise disorderly conduct" in Wis JI-Criminal 1900.

1750 PERJURY — § 946.31

Statutory Definition of the Crime

Perjury, as defined in § 946.31 of the Criminal Code of Wisconsin, is committed by one who, while under (oath) (affirmation) orally makes a false material statement which the person does not believe to be true, in any proceeding[1] before a court.[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant orally made a statement while under (oath) (affirmation).[3]
2. The statement was false when made.
3. The defendant did not believe the statement to be true when made.

   [It is not a defense to a prosecution under this section that testimony that constituted perjury at the time it was given was subsequently corrected or retracted.][4]
4. The statement was made in a proceeding before a court.[5]
5. The statement was material to the proceeding.

   A material statement is one that tends to prove or disprove any fact that is of consequence to the determination of the proceeding in which the statement was

made.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1750 was originally published in 1966 and revised in 1994, 1995, 2004, and 2020. This revision was approved by the Committee in October 2023. It removed a footnote that addressed the matter of the defendant's knowledge of whether the statement was true or false.

This instruction is for a violation of § 946.31, Perjury. Related offenses are covered by § 946.32, False Swearing. See Wis JI-Criminal 1754, 1755, and 1756.

The doctrine of issue preclusion does not bar the State from prosecuting a defendant for perjury allegedly committed at a criminal trial where the defendant was acquitted on a single issue but where the State claims to have discovered new evidence that the defendant falsely testified regarding that issue. The State must show that the evidence meets the four requirements of the newly discovered evidence test. State v. Canon, 2001 WI 11, ¶¶1, 25, 241 Wis.2d 164, 622 N.W.2d 270.

Multiple counts of perjury based on statements in a single proceeding are permissible where each requires proof of a fact the other does not and each required a new "volitional departure." State v. Warren, 229 Wis.2d 172, 599 N.W.2d 379 (Ct. App. 1999).

Regarding solicitation of perjury, see State v. Manthey, 169 Wis.2d 673, 487 N.W.2d 44 (Ct. App. 1992). The court held that a solicitation of perjury charge was established where the defendant solicited another to pay money to the defendant for false testimony (referring to this as a "double inchoate crime"). 169 Wis.2d 673, 687.

The problem of perjury prosecutions of witnesses after an acquittal in a criminal case is discussed in Shellenberger, "Perjury Prosecutions After Acquittals. . . ." 71 Marquette Law Review 703 (1988).

1. Section 946.31(1) applies to statements made in "any matter, cause, action or proceeding." The instruction uses the term "proceeding" throughout based on the Committee's conclusion that it is a general term that includes the other alternatives. (See, for example, § 801.01(1), which provides: "Proceedings in the courts are divided into actions and special proceedings." Emphasis added.)

2. "Court" is selected from the list of alternatives set forth in § 946.31(1):

(a) A court;
(b) A magistrate;
(c) A judge, referee or court commissioner;
(d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
(e) A notary public while taking testimony for use in an action or proceeding pending in court;
(f) An officer authorized to conduct inquests of the dead;
(g) A grand jury;
(h) A legislative body or committee.

The instruction must be modified if an alternative other than "court" is involved. See text at notes 6 and 8 below.

See Layton School of Art & Design v. WERC, 82 Wis.2d 324, 262 N.W.2d 218 (1978), for a discussion of the alternative set forth in § 946.31(1)(d): ". . . an . . . arbitrator authorized by statute to determine issues of fact."

Omitted from the instruction's definition of the offense is the statutory language: "whether legally constituted or exercising powers as if legally constituted." That phrase was added to § 946.31(1) in 1980 to replace "whether de jure or de facto." (See Chapter 110, section 58, Laws of 1979.) The previous version of this instruction included definitions of "de jure" and "de facto" and followed them with a statement that there is no reason to distinguish between the two for purposes of this offense. The same is true for the current statute's "legally constituted" phrase and, therefore, the Committee concluded that it is not necessary to include it in the instruction.

This interpretation is supported by State v. Petrone, 166 Wis.2d 220, 479 N.W.2d 212 (Ct. App. 1991). Petrone challenged her perjury conviction on the ground that the reserve judge who conducted the John Doe proceeding at which she made a false statement had not been properly appointed by the chief justice under § 753.075(1). The court rejected the argument, citing the statute: ". . . legally constituted or exercising powers as if legally constituted." The court held that the judge was acting with what was formerly referred to as de facto powers and, therefore, was covered by the statute. The court cited footnote 7 to the 1966 version of Wis JI-Criminal 1750, which, as explained above, instructed the jury that the distinction between de facto and de jure made no difference. That principle has not changed; the Committee concluded that it is not a matter that needs to be communicated to the jury. As illustrated by the Petrone case, it is a legal matter relating to the scope of the statute, not a factual question for the jury to decide.

3. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

4. This instruction should be given when warranted by the evidence. § 946.31(2).

5. See notes 1 and 2, supra.

6. This definition of "material" was cited with approval in State v. Munz, 198 Wis.2d 379, 382, 541

N.W.2d 821 (Ct. App. 1995). The court held that testimony is material if the court could have relied on it, "irrespective of whether the court ultimately relied upon the testimony in reaching its decision." 198 Wis.2d 379, 385.

The definition of "material" is adapted from part of the definition of "relevant evidence," in § 904.01. The Judicial Council Committee's Note indicates § 904.01 is consistent with recent Wisconsin cases, including State v. Becker, 51 Wis.2d 659, 188 N.W.2d 449 (1971), which "adopted McCormick's view of the distinction between materiality and relevancy which is imported into § 904.01 by the phrase 'that is of consequence to the determination of the action.'" 59 Wis.2d R67 (1973).

Federal Rule of Evidence 404 is identical. "The rule uses the phrase 'fact that is of consequence to the determination of the action'. . .; it has the advantage of avoiding the loosely used and ambiguous word 'material.'" Federal Advisory Committee's Note, 59 Wis.2d R69.

The 1966 version of Wis JI-Criminal 1750 included the following in parentheses in the text of the instruction:

(In a proper case, the court may instruct the jury that the statement is material, as a matter of law.)

There was no explanation that identified "a proper case" and no citation of authority for the proposition that materiality was a matter of law.

The Committee decided to delete the parenthetical sentence from the 1993 revision of the instruction because there is no direct authority in Wisconsin for having the judge, as opposed to the jury, decide whether a statement was material.

The history of the Wisconsin perjury statute shows that the 1953 Criminal Code draft eliminated "materiality" altogether. However, it was restored by the Criminal Code Advisory Committee during the 1954-55 discussions of the draft, which essentially reestablished the common law definition of the crime. During those discussions, the minutes indicate that there was a motion to add a definition of "materiality" and include a statement that "materiality is a question of law for the court." The motion failed. (See Minutes of the Criminal Code Advisory Committee, May 26, 1955, pages 2-6.)

Prior to the decision of the United States Supreme Court in United States v. Gaudin, 515 U.S. 506 (1995), the rule in the majority of federal circuits was that materiality is a matter of law for the court to decide. The statement in United States v. Watson, 623 F.2d 1198 (7th Cir. 1980), was typical:

> Although proof of a statement's materiality, . . . is an essential element of the crime charged in the indictment, it is well settled that the determination of materiality is a question of law for the court. . . . Since the issue of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt. . . .

The Gaudin decision rejected this view, holding that it was error for a trial court to refuse to submit the question of materiality to the jury. Gaudin was charged with violating 18 U.S.C. § 1001 by making false representations on HUD forms in connection with real estate transactions. The government conceded that the statute is violated only when the false representations go to "material facts." The court stated the basic principles that apply to resolving the question presented in this case and rejected government arguments

that the basic principles should not apply:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.

515 U.S 506, 511.

The court found no basis in law or history for treating the materiality differently than other elements of other crimes. It repudiated the decision in Sinclair v. United States, 279 U.S. 263 (1929), which had held that the issue of whether questions were "pertinent" under a statute penalizing the refusal to answer questions "pertinent" to a congressional inquiry was for the court, not the jury.

Gaudin, though involving a federal statute, articulated basic constitutional principles that ought to apply to the analysis of the Wisconsin perjury statute. Its holding confirms the Committee's conclusion the parenthetical reference in the 1966 version of Wis JI-Criminal 1750 was insufficient authority for removing the materiality element from the jury's consideration. Wisconsin cases have been strict in refusing to approve trial court actions that arguably remove an element from the jury's consideration, even where an element involves largely a "legal" conclusion. See, for example, State v. Leist, 141 Wis.2d 34, 414 N.W. 2d 45 (Ct. App. 1987), where the court held it was error for the trial court to tell the jury that the document involved in the case was "false, sham, or frivolous." (Leist is discussed in the Comment to Wis JI-Criminal 1499.)

This conclusion is further supported by the decision in State v. Williams, 179 Wis.2d 80, 505 N.W.2d 468 (Ct. App. 1993), which involved medical assistance fraud under § 49.49(1)(a). That offense also requires "material" false statements and the court held that it was error for the trial court to deny the defendant the opportunity to introduce evidence relevant to the materiality of the statements made. "If the statements had no legal effect, the court could determine as a matter of law that the false statements were not material. At the very least, the jury should be given the opportunity to determine whether the false statements were material based upon the evidence concerning the legal effect of the statements." 179 Wis.2d 80, 87-88. Thus, if it is error to limit evidence as to "materiality," it should be error to withdraw the "materiality" issue from the jury's consideration.

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1754 FALSE SWEARING: FALSE STATEMENT UNDER OATH: FELONY — § 946.32(1)(a)

Statutory Definition of the Crime

False swearing, as defined in § 946.32(1)(a) of the Criminal Code of Wisconsin, is committed by one who under (oath) (affirmation) makes or subscribes a false statement which (he) (she) does not believe is true, when such (oath) (affirmation) is (authorized or required by law)[1] (required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (made) (subscribed)[2] a false statement.
2. The defendant did not believe the statement to be true when (made) (subscribed).
3. The statement was (made) (subscribed) under (oath) (affirmation).[3]

USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.[4]

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written statement is under (oath) (affirmation) when it is subscribed or signed by a person

who swears that it is the truth before some person authorized[5] to administer an (oath) (affirmation).]

4. The (oath) (affirmation) was (authorized or required by law) (required by any public officer or governmental agency as a prerequisite to the officer or agency taking some official action).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1754 was originally published in 1994 and revised in 2004. This revision was approved by the Committee in October 2023. It removed a footnote that addressed the matter of the defendant's knowledge of whether the statement was true or false.

This instruction is for a violation of § 946.32(1)(a); violations of sub. (1)(b) are addressed in Wis JI Criminal 1755. Violations of sub. (1) are felonies. The misdemeanor offense defined in sub. (2) is addressed by Wis JI Criminal 1756.

1. One alternative is that the sworn statement must be "authorized or required" by law. An affidavit made for no reason or for a purpose for which the law does not specifically authorize or require an oath, e.g., endorsement of a product, is not within the statute. See State v. Zisch, 243 Wis. 175, 9 N.W.2d 625 (1943). The unauthorized affidavit, if false, is covered by § 946.32(2), the misdemeanor false swearing offense.

In State v. Devitt, 82 Wis.2d 262, 270, 262 N.W.2d 73 (1978), the court concluded that "authorized by law" must "be narrowly construed in light of a penal statute, the definition of 'permitted' [urged by the state] is inappropriate." The court cited the definition provided in Black's Law Dictionary, 4th ed., p. 169, as indicating "that 'authorize' means more than consistent with the general scheme. Among its definitions: 'To empower; to give a right or authority to act . . . It has a mandatory effect or meaning, implying a direction to act. Authorized is sometimes construed as equivalent to directed.'" The court found that the filing of the statements in question were not "authorized" by the state Corrupt Practices Act (§ 12.09(5)(b),

1971 Wis. Stats.). The court also noted that the alleged misconduct was "not a wrong without a remedy. The misdemeanor false swearing statute, see § 946.32(2), would clearly apply in this case because it has no requirement that the false statement be made under oath or affirmation required or authorized by law." 82 Wis.2d 262, 270-71.

2. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262, N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

3. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

4. The bracketed material is provided for possible use where one or more written statements are involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

5. Section 887.01 identifies those who may administer oaths.

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1756 FALSE SWEARING: FALSE STATEMENT UNDER OATH: MISDEMEANOR — § 946.32(2)

Statutory Definition of the Crime

False swearing, as defined in § 946.32(2) of the Criminal Code of Wisconsin, is committed by one who under (oath) (affirmation) makes or subscribes a false statement which (he) (she) does not believe is true.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (made) (subscribed)[1] a false statement.
2. The defendant did not believe the statement to be true when (made) (subscribed).
3. The statement was (made) (subscribed) under (oath) (affirmation).[2]

[USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.][3]

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written statement is under (oath) (affirmation) when it is subscribed or signed by a person who swears that it is the truth before some person authorized[4] to administer an (oath) (affirmation).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1756 was originally published in 1994 and revised in 2004. This revision was approved by the Committee in October 2023. It removed a footnote that addressed the matter of the defendant's knowledge of whether the statement was true or false.

This instruction is for the misdemeanor offense defined in § 946.32(2). The felony offenses defined in sub. (1) are addressed by Wis JI Criminal 1754 and 1755.

1. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262 N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

2. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

If further elaboration in the oath or affirmation requirement is desired, see the text at note 5, Wis JI-Criminal 1755.

3. The bracketed material is provided for possible use where one or more written statements are involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

4. Section 887.01 identifies those who may administer oaths.

1790 AIDING A FELON — § 946.47(1)(a)

Statutory Definition of the Crime

Aiding a felon, as defined in § 946.47(1)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to prevent the apprehension of a felon, harbors or aids the felon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant aided (name of person aided).

   To aid means to help or assist.[1]

2. (Name of person aided) [was a felon] [had engaged in the prohibited felonious conduct of (name of crime)[2]].

   [A felon is a person who has committed a crime punishable by imprisonment in the Wisconsin state prisons.[3] (Name of crime) is such a crime,[4] and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) committed that crime. (Name of crime) is committed by one who

   LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS

NECESSARY.[5]]

[(Name of crime) is prohibited felonious conduct in Wisconsin,[6] and the State must prove by evidence which satisfies you beyond a reasonable doubt that (name of person aided) engaged in this prohibited felonious conduct. (Name of crime) is committed by one who

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[7]]

3. The defendant knew that (name of person aided) had engaged in the conduct which constitutes (name of crime).[8]

4. The defendant aided (name of person aided) with the intent to prevent the apprehension of (name of person aided).[9]

This element requires that the defendant had the purpose of preventing (name of person aided) from being taken into custody by law enforcement officers or was aware that (his) (her) conduct was practically certain to cause that result.[10]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1790 was originally published in 1981 and revised in 1991, 2007, and 2009, and 2014. The 2014 revision added to the text at element 2 and revised the Comment and footnotes to reflect changes made by 2013 Wisconsin Act 254. This revision was approved by the Committee in December 2023. It modified element 2 by providing an option for individuals who have engaged in the prohibited felonious conduct.

This instruction is for an offense under § 946.47(1)(a). It covers conduct which at common law made the accused an "accessory after the fact." Conduct relating to the destruction of evidence is prohibited by § 946.47(1)(b). See Wis JI Criminal 1791.

Section 946.47(3) formerly provided an exclusion for persons related to the felon. That provision was repealed by 2013 Wisconsin Act 254 [effective date: April 10, 2014].

2013 Wisconsin Act 254 also changed the penalty structure for this offense. See subsection (2m) of § 946.47. It is a Class G felony if the defendant aided a felon who committed a Class A, B, C, or D felony; it is a Class I felony if the defendant aided a felon who committed a Class E, F, G, H, or I felony. Because the crime committed by the felon will be specified in the second element, there is no need for any additional fact-finding as to the classification of that crime.

Section 946.47 applies to aiding felons who committed a crime outside of Wisconsin that was a felony in that jurisdiction and would also be a felony if committed in Wisconsin. See § 946.47(2). The Committee concluded that the jury must find that the facts constituting the out-of-state crime occurred, but that it is for the judge to determine that those facts constituted a felony in the other state and would constitute a felony in Wisconsin.

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 16 (Ct. App. 1998), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation:

. . . The plain language of § 946.67(1)(a) and (2)(a) suggests no distinction between a person who has already been convicted of a felony and is now wanted for a parole violation following that conviction, and a person who is now wanted for, but has not yet been convicted of, a felony. Each is a "felon" within the definition of § 946.47(2)(a) because each "commits an act . . . which constitutes a felony under the laws of this state."

Note that § 946.46 makes it a Class A misdemeanor to aid or encourage a person under supervision to abscond or violate a condition of supervision.

1. "'Harbor or aid' includes giving the person food, shelter, medical treatment or money or performing an operation to change his fingerprints or his appearance." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wis. Legislative Council). (1953 Report.) "Harbor" means to give shelter or refuge to. Webster's Third International Dictionary.

2. "Felon," as used in § 946.47, refers to a person who has engaged in prohibited felonious conduct, whether convicted or not. State v. Jones, 98 Wis.2d 679, 681, 298 N.W.2d 100 (Ct. App. 1988).

3. Wis. Stat. § 939.60.

4. Here use the short title for the felony, for example: "Burglary is such a crime." The Committee concludes that the jury may be told that a certain crime constitutes a felony under the laws of Wisconsin. However, the jury must find that the person aided committed the crime. In the usual case, the person aided will have been convicted and proof will not be difficult.

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 16 (Ct. App. 1980), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation. See Comment preceding note 1.

5. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

6. Here use the short title for the felony, for example: "Burglary is such a crime." The Committee concludes that the jury may be told that a certain crime is prohibited felonious conduct in Wisconsin. However, the jury must find that the person aided engaged in this prohibited felonious conduct. It is not necessary that the person aided have been convicted of, or even charged with, the felony. State v. Jones, 98 Wis.2d 679, 298 N.W.2d 100 (Ct. App. 1980).

7. See footnote 5, supra.

8. In State v. Jones, 98 Wis.2d 679, 681, 298 N.W.2d 100 (Ct. App. 1988), the court held that a required element of this offense is that "the accused had actual knowledge" of the offense committed by the person aided.

The third element of the instruction does not require that the defendant know the precise name of the felony committed or know that the conduct engaged in by the person aided is a felony. It does require that the defendant know what conduct was engaged in by the person aided. That conduct must constitute a felony under the law of Wisconsin.

"This section requires that the actor (1) intend to prevent the apprehension of a person he knows has committed a crime which in fact constitutes a felony. . . ." 1953 Judiciary Committee Report on the Criminal

Code, p. 195 (Wis. Legislative Council).

In a case where further definition of the defendant's knowledge is desired, and additional sentence connecting the knowledge requirement with the elements of the crime may be helpful. For example, where the felony is burglary: "This requires that the defendant knew that (name person aided) intentionally entered a building without the consent of the person in lawful possession and with intent to steal."

In State v. Schmidt, 221 Wis.2d 189, 198, 585 N.W.2d 16 (Ct. App. 1998), the court held that § 946.47 could be applied to a person who aided a convicted felon who was wanted for a parole violation. See Comment preceding note 1. For a case like Schmidt, the elements of the crime need not be summarized, since it is likely the state will simply introduce documentary proof that the person had been convicted of a felony and was on parole on a sentence for the conviction.

9. "Whether the actor has an intent to prevent the apprehension of the felon is a question of fact depending on the circumstances of each case. For example, a person who has committed a felony might go to the home of a friend who, having never been faced with such a situation before, might allow him to remain there for an hour or might give him food or medical treatment without having formed an intent to prevent his apprehension by the police." 1953 Judiciary Committee Report on the Criminal Code, p. 195 (Wis. Legislative Council).

10. Section 939.23(4). See Wis JI-Criminal 923A and 923B.

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OFFICE OF JUDICIAL EDUCATION
1/2024

WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME III

Wisconsin Criminal Jury Instructions Committee

[Cite as Wis JI-Criminal]

- Includes 1/2024 Supplement (Release No. 63)

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1900 DISORDERLY CONDUCT — § 947.01

Statutory Definition of the Crime

Disorderly conduct, as defined in § 947.01 of the Criminal Code of Wisconsin, is committed by a person who, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[1]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts, or language, or both.[2]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[3] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether

committed by words or acts. Conduct is disorderly although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type which tends to disrupt good order and provoke a disturbance.][4]

The principle upon which this offense is based is that in an organized society a person should not unreasonably offend others in the community.[5] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large, but that might disturb an oversensitive person.

Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance under the circumstances as they then existed.[6] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

WHERE THE STATE'S CASE RELIES IN PART ON EVIDENCE THAT THE DEFENDANT WAS CARRYING A FIREARM AT THE TIME OF THE ALLEGED OFFENSE, ADD THE FOLLOWING:[7]

[Loading, carrying, or going armed with a firearm does not, by itself, constitute disorderly conduct unless other facts and circumstances indicate a criminal or malicious intent.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1900 was originally published in 1966. Non-substantive revisions and additions to the comment were made in 1989, 1991, 1998, 1999, 2001, 2002, 2004, 2009 and 2022. In 2012, revisions were made that involved the addition of the bracketed material preceding the "Jury's Decision" paragraph to reflect 2011 Wisconsin Act 35. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" provided in the comment.

In State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965), the court affirmed the convictions of several civil rights demonstrators on the grounds that the defendant's conduct met the requirements of the disorderly conduct statute as to being disruptive of good order and tending to provoke a disturbance and on the additional grounds that each defendant deliberately and knowingly violated commands of persons in authority. In so ruling, the court held that persons in authority over public buildings must be accorded discretion to regulate conduct therein. In appropriate cases, the jury should be instructed on failure to obey lawful commands of persons in authority as constituting disorderly conduct. See note 4, below.

The application of disorderly conduct and related statutes often involves claims that the exercise of constitutional rights prevents such application or excuses what would otherwise be a criminal violation. For recent discussions, see the following: City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989) (disorderly conduct ordinance); State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989) (criminal trespass to medical facility statute); Milwaukee v. K.F., 145 Wis.2d 24, 426 N.W.2d 329 (1988) (juvenile loitering ordinance); Milwaukee v. Nelson, 149 Wis.2d 434, 439 N.W.2d 562 (1989) (adult

loitering ordinance); State v. Dronso, 90 Wis.2d 110, 279 N.W.2d 710 (Ct. App. 1979) (§ 947.01). Also see Texas v. Johnson, 109 S. Ct. 2533 (1989), dealing with the federal flag desecration statute.

In State v. Olsen, 99 Wis.2d 572, 299 N.W.2d 632 (Ct. App. 1980), the defendants were charged with disorderly conduct as a result of demonstrations against a shipment of spent fuel from a nuclear power plant. The court of appeals held that the trial court acted properly in excluding evidence offered by the defendant to show that his conduct was privileged under the defense of necessity as set forth in § 939.47. The court held that necessity is limited to the pressure of natural physical forces such as "storms, fires and privations" and, therefore, is not available in the context of a protest against the transportation of spent nuclear fuel. 99 Wis.2d 572, 576.

1. The Committee recommends selecting one of the terms in parentheses where possible but believes it is proper to instruct on all alternatives that are supported by the evidence. The Wisconsin Supreme Court affirmed this position in Doubek v. Kaul, 2022 WI 31, ¶14, --N.W.2d--, stating that "[T]he language of Wis. Stat. § 947.01(1) is most naturally read as creating a single crime of disorderly conduct, while listing alternative means to satisfy its first element. The focus of the list is any type of conduct that is disorderly." Based on this finding, the court concluded that "Wisconsin's disorderly conduct statute is indivisible, and enumerates different means of committing the same crime." Id.

Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats." Douglas D., ¶32; A.S., ¶22. Both A.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. Wis JI-Criminal 1240B, Threat To A Judge, offers the following definition of "true threat," based on Perkins:

> A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.

2. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].

> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer, and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

3. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct" which tends to provoke a disturbance means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. This interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
>
> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients, but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

4. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site, which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

5. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case the defendant has testified that he engaged in the conduct in order to protest the Viet Nam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

6. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

7. Section 947.01 was amended by 2011 Wisconsin Act 35, the "licensed carry" law. The current statute was renumbered § 947.01(1) and a new subsection (2) was created to read:

> (2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

The Committee concluded that the new provision is best addressed by adding a statement for cases where there is evidence that the defendant was carrying a firearm at the time of the alleged disorderly conduct.

The phrase "criminal or malicious intent" is used in new sub. (2) of § 947.01. The Committee concluded that "criminal intent" means "intent to commit a crime." "Malicious" does not have an established meaning in the current Wisconsin Criminal Code [with one exception: see § 940.41(1r), that is not applicable here].

1901 DISRUPTING A FUNERAL OR MEMORIAL SERVICE — § 947.011(2)(a)1.

Statutory Definition of the Crime

Disrupting a funeral or memorial service, as defined in § 947.011(2)(a)1. of the Criminal Code of Wisconsin, is committed by a person who engages in disorderly conduct (during a funeral or memorial service) (during the 60 minutes immediately preceding the scheduled starting time of a funeral or memorial service) (during the 60 minutes immediately following a funeral or memorial service),[1] within 500 feet of any entrance to a facility being used for the service, and with intent to disrupt the service.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant engaged in (violent) (abusive) (indecent) (profane) (boisterous) (unreasonably loud) (or otherwise disorderly) conduct.[2]
2. The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.
3. The conduct of the defendant occurred (during a funeral or memorial service) (during the 60 minutes immediately preceding the scheduled starting time of a

funeral or memorial service) (during the 60 minutes immediately following a funeral or memorial service).[3]

4. The conduct of the defendant occurred within 500 feet of any entrance to a facility being used for the service.

5. The defendant engaged in the conduct with intent to disrupt the service.

Meaning of "Disorderly Conduct"

"Disorderly conduct" may include physical acts, language, or both.[4]

[The general phrase "otherwise disorderly conduct" means conduct having a tendency to disrupt good order and provoke a disturbance.[5] It includes all acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts. Conduct is disorderly, although it may not be violent, abusive, indecent, profane, boisterous, or unreasonably loud if it is of a type that tends to disrupt good order and provoke a disturbance.][6]

The principle upon which this offense is based is that in an organized society, a person should not unreasonably offend others in the community.[7] This does not mean that all conduct that tends to disturb another is disorderly conduct. Only conduct that unreasonably offends the sense of decency or propriety of the community is included. It does not include conduct that is generally tolerated by the community at large, but that might disturb an oversensitive person.

Meaning of "Tend to Cause or Provoke a Disturbance"

It is not necessary that an actual disturbance must have resulted from the defendant's conduct. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance under the circumstances as they then existed.[8] You must consider not only the nature of the conduct but also the circumstances surrounding that conduct. What is proper under one set of circumstances may be improper under other circumstances. This element requires that the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance.

Deciding About Intent To Disrupt

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1901 was approved by the Committee in June 2006. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" provided in the comment.

This instruction is drafted for violations of § 947.011(2)(a)1. Section 947.011 was created by 2005 Wisconsin Act 114; effective date: March 1, 2006.

Act 114 created six offenses. Subsection (2)(a) defines two offenses: subd. 1. prohibits engaging in disorderly conduct within 500 feet and 60 minutes of a funeral service with intent to disrupt the service. This is the offense addressed by this instruction. Subsection (2)(a)2. prohibits intentionally blocking access to a facility being used for a service; an instruction has not been drafted for this violation. Subsection (2)(b) prohibits impeding vehicles with intent to disrupt a funeral process; see Wis JI Criminal 1901A. Subsections (2)(c) and (d) define offenses that are the same as subs. (2)(a) and (b), respectively, except that they do not include an intent element. Wis JI Criminal 1901 or 1901A could be adapted for use for those offenses by deleting the intent elements.

Violations of § 947.011 are Class A misdemeanors except that: "Any person who violates sub. (2)(a) or (b) after having been convicted of a violation of this section is guilty of a Class I felony." See sub. (3). Thus, only second offenses charged under sub. (2)(a) or (b) become felonies if the defendant has a prior conviction under any subsection of § 947.011.

1. The Committee recommends selecting the alternative supported by the evidence.

2. Speech alone in certain contexts can constitute disorderly conduct. State v. A.S., 2001 WI 48, ¶1, 243 Wis.2d 173, 626 N.W.2d 712. Also see State v. Douglas D., 2001 WI 47, ¶3, 243 Wis.2d 204, 626 N.W.2d 725. Verbal or written statements may constitute "abusive conduct" if they "tended to provoke retaliatory conduct on the part of the person or persons to whom the statements were addressed." A.S., ¶29. Also see Douglas D., ¶32. Speech can be considered "otherwise disorderly" if it is of a type that tends to disrupt good order. A.S., ¶33. If the statements constitute threats, they must be "true threats." Douglas D., ¶32; A.S., ¶22. Both A.S. and Douglas D. applied a definition of "true threat" announced in State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762. Perkins involved a charge under § 940.203, which prohibits threats to a judge. Wis JI-Criminal 1240B, Threat To A Judge, offers the following definition of "true threat," based on Perkins:

> A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This element requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.

3. The Committee recommends selecting the alternative supported by the evidence.

4. Teske v. State, 256 Wis. 440, 444, 41 N.W.2d 642 (1950).

A common disorderly conduct situation involves directing abusive language to police officers. The Wisconsin Supreme Court has discussed the general principles applicable to this situation in a civil case where a person arrested for disorderly conduct sued the arresting officer for false imprisonment:

> The fact that the abusive language is directed to a policeman or other law enforcement officer and is not overheard by others does not prevent it from being a violation . . . [of a disorderly conduct statute or ordinance].

> However, a police officer cannot provoke a person into a breach of the peace, such as directing abusive language to the police officer and then arrest him without a warrant. Lane v. Collins, 29 Wis.2d 66, 72, 138 N.W.2d 264 (1965) (footnote omitted).

5. In State v. Givens, 28 Wis.2d 109, 115, 135 N.W.2d 780 (1965), the court held that the phrase "otherwise disorderly conduct," which tends to provoke a disturbance, means conduct of a type not previously enumerated in the statute but similar thereto in having a tendency to disrupt good order and to provoke a disturbance. Such interpretation rests upon the rule of ejusdem generis. The statute is not unconstitutionally vague.

In State v. Schwebke, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666, the court upheld the application of the disorderly conduct statute to mailings sent by the defendant to three different victims. The conduct can be considered "otherwise disorderly conduct" under § 947.01:

> . . . [T]he disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order, or safety of the surrounding community as well.
> Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. See Douglas D., 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct. 2002 WI 55, ¶30.
>
> . . . [T]he disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well. 2002 WI 55, ¶31.
>
> . . . [W]e conclude that the disorderly conduct statute was appropriately applied to Schwebke's conduct in this case. In each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person. In each instance, the mailings constituted conduct that not only caused disturbances to the lives of the recipients but the conduct was of the type that would be disruptive to peace and good order in the community. 2002 WI 55, ¶32.

6. The paragraph in brackets is intended for use primarily where the "otherwise disorderly conduct" alternative is used. In Teske v. State, supra, the court quotes this definition from 17 Am. Jur. Disorderly Conduct § 1 (1957), which is also adopted by the court in State v. Givens, supra.

In City of Oak Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285 (1989), the Wisconsin Supreme Court reviewed the application of a disorderly conduct ordinance (modeled after § 947.01) to a television reporter who refused to obey police orders to leave the scene of the 1985 Midwest Express airplane crash. The court held that the defendant's conduct violated the statute under the "otherwise disorderly" provision. There was a legitimate need to maintain control at the crash site, which was threatened by the defendant's refusal to obey the police order to stay out of the restricted area. The conduct tended to cause a disturbance because others may have followed the defendant if he had been allowed to disobey the officer.

7. This statement is based on the decision in State v. Givens, supra, where the court quoted from the comment to a proposed disorderly conduct section contained in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The 1999 revision made minor changes in this statement in the interest of clarity; no change in meaning was intended.

Deciding whether conduct "unreasonably" offends the sense of decency or propriety of the community may be aided by comparing the harm to the public and the social value of the defendant's conduct.

An instruction attempting to explain this comparison might read as follows:

> In determining whether the conduct "unreasonably" offends the public sense of decency and propriety, you should weigh the degree to which decency and propriety were offended by the conduct against any contribution to the public interest made by the conduct. In this case, (here specify the reason the conduct was engaged in). [EXAMPLE: In this case, the defendant has testified that he engaged in the conduct in order to protest the Vietnam War.] Conduct unreasonably offends the public sense of decency and propriety if, but only if, the harm to the public outweighs the social value achieved by the defendant's conduct.

8. This statement is found in the comment to proposed § 347.01 in Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 208 (Wis. Legislative Council, February 1953). The phrase "tending to create or provoke a breach of the peace," as found in § 943.145, Criminal Trespass To A Medical Facility, was discussed in State v. Migliorino, 150 Wis.2d 513, 442 N.W.2d 36 (1989).

1902 UNLAWFUL USE OF TELEPHONE — § 947.012(1)(a)

Statutory Definition of the Crime

Unlawful use of telephone, as defined in § 947.012(1)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to frighten, intimidate, threaten, abuse or harass, makes a telephone call and threatens to inflict injury or physical harm to any person or the property of any person.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant made a telephone call to (name of victim).
2. In making the telephone call to (name of victim), the defendant intended to[1] (frighten) (intimidate) (threaten) (abuse) (harass)[2] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that his or her conduct was practically certain to cause that result.[3]
3. In the course of that telephone call, the defendant threatened[4] to inflict (physical harm to) (damage to the property of) any person.

It is not necessary that the person making the threat have the ability to carry out the threat.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1902 was originally published in 1981 and revised in 1992, 1996, and 2008. This revision was approved by the Committee in October 2023; it updated case law citations in the comment.

Section 947.012, Unlawful Use Of Telephone, was created by Chapter 131, Laws of 1979. The original statute contained six subsections and was apparently modeled after a federal statute, 47 U.S.C. § 223. The statute was revised by 1991 Wisconsin Act 39, effective August 15, 1991. This instruction is for an offense under subsection (1)(a) of the revised statute; the offense was previously defined in § 947.012(1), 1989 90 Wis. Stats. 1991 Wisconsin Act 39 changed some violations of § 947.012 from crimes to forfeitures. The penalty for this offense was not affected; it is a Class B misdemeanor.

1. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

2. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

> (b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute and its definition of harassment were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

3. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

4. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, 307 Wis.2d 488, 746 N.W.2d 564, the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following is the most complete definition of "true threat" offered by the court in State v. Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

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1908 UNLAWFUL USE OF A COMPUTERIZED COMMUNICATION SYSTEM — § 947.0125(2)(a)

Statutory Definition of the Crime

Unlawful use of [an electronic mail] [a computerized communication] system, as defined in § 947.0125(2)(a) of the Criminal Code of Wisconsin, is committed by one who with intent to frighten, intimidate, threaten, abuse or harass another person, sends a message to the person on [an electronic mail] [a computerized communication] system, and threatens to inflict injury or physical harm to any person or the property of any person

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant sent a message[1] to (name of victim) on [an electronic mail] [a computerized communication] system.
2. The defendant sent the message to (name of victim) with intent to[2] (frighten) (intimidate) (threaten) (abuse) (harass)[3] (name of victim).

   "With intent to (frighten) (intimidate) (threaten) (abuse) (harass)" means that the defendant acted with the mental purpose to (frighten) (intimidate) (threaten) (abuse) (harass) another person or was aware that the conduct was practically

certain to cause that result.[4]

3. In the message, the defendant threatened[5] to inflict [physical harm to] [damage to the property of] any person.

It is not necessary that the person making the threat have the ability to carry out the threat.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1908 was originally published in 1996 and revised in 2008. This revision was approved by the Committee in October 2023; it updated case law citations in the comment.

Section 947.0125, Unlawful Use Of Computerized Communication Systems, was created by 1995 Wisconsin Act 353. Effective date: June 7, 1996. Violations of subsec. (2) are Class B misdemeanors.

1. "Message" is defined as follows in § 947.0125(1): "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, or any transfer of a computer program." The definition also provides that "computer program" is as defined in § 943.70.

2. The Committee recommends that one of the alternatives in parentheses should be elected if possible because it clarifies the issue for the jury. The Committee does not conclude that an instruction joining one or more alternatives in the disjunctive would be error. See Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979); Manson v. State, 92 Wis.2d 40, 284 N.W.2d 703 (Ct. App. 1979); and United States v. Gipson, 553 F.2d 453 (5th Cir. 1977).

3. "Harassment" is referred to in § 947.013(1m)(b), which identifies one type of harassment penalized by that statute:

(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose.

The § 947.013(1m)(b) reference is the same as the one used in the harassment restraining order statute, § 813.125(1)(b). The restraining order statute and its definition of harassment were found to be constitutional by the Wisconsin Supreme Court in Bachowski v. Salamone, 139 Wis.2d 397, 407 N.W.2d 533 (1987), where the court found the meaning of harassment readily ascertainable by reference to a dictionary: "'Harass' means to worry or impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil, or badger." 139 Wis.2d 397, 407, citing Webster's Third New International Dictionary 1031 (1961).

"Harass" is defined as "to annoy persistently" in Webster's New Collegiate Dictionary.

4. See § 939.23(4) and Wis JI-Criminal 923A and 923B.

5. Wisconsin appellate courts have held that some criminal statutes prohibiting threats must be read to apply only to "true threats." For example, in State v. Robert T., 2008 WI App 22, 307 Wis.2d 488, 746 N.W.2d 564, the court of appeals held that "§ 947.015 must be read with the limitation that only a false bomb scare that constitutes a 'true threat' can be charged." ¶12. State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762, reached the same conclusion for violations of § 940.203, Threat to a judge. Also see State v. A.S., 2001 WI 48, 243 Wis.2d 173, 626 N.W.2d 712, holding that a "true threat" is required for disorderly conduct charges based on threats.

The Committee concluded that a separate definition of "true threat" is not necessary in this instruction because its substance is covered by the second element, which requires that the defendant "intended to frighten, intimidate, threaten, abuse, or harass" the victim.

The following is the most complete definition of "true threat" offered by the court in State v. Perkins:

> A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

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1925A INTENTIONAL TERRORIST THREATS — § 947.019(1)(a) - (d)

Statutory Definition of the Crime

Making a terrorist threat, as defined in § 947.019 of the Criminal Code of Wisconsin, is committed by any person who threatens to cause the death of or bodily harm to any person or to damage any person's property and who intends to (prevent the occupation of or cause the evacuation of a building)[1] (cause public inconvenience) (cause public panic or fear) (cause an interruption or impairment of governmental operations).[2]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause the death of or bodily harm to any person or to damage any person's property.

   A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person making the threat have the ability to carry out the threat. You must consider all the

circumstances in determining whether a threat is a true threat.[3]

2. The defendant intended to (prevent the occupation of or cause the evacuation of a building) (cause public inconvenience) (cause public panic or fear) (cause an interruption or impairment of governmental operations).

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1925A was approved by the Committee in December 2016. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

This instruction is drafted for violations of sec. 947.019(1)(a) - (d), created by 2015 Wisconsin Act 311 [effective date: April 1, 2016]. Each subsection requires intent to cause the specified result. Violations of sub. (1)(e), which involve recklessness instead of intent, are addressed by Wis JI Criminal 1925B.

The offense is a Class I felony unless the violation "contributes to any individual's death," in which case the penalty increases to a Class G felony. Sec. 947.019(2).

1. In addition to applying to a "building," the statute also applies to "dwelling, school premises, vehicle, facility of public transportation, or place of public assembly or any room within a building, dwelling, or school." The instruction is drafted for "building" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

2. The statute also applies to causing an interruption or impairment of "public communication, of transportation, or of a supply of water, gas, or other public service." The instruction is drafted for

impairment of "governmental operations" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

3. Other Wisconsin statutes prohibiting a "threat" have been interpreted to require a "true threat." The definition of "true threat" is based on the one used for the other criminal offenses involving threats and is derived from State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. For a complete explanation of the definition, see footnote 3, Wis JI-Criminal 1240B Threat To A Judge.

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1925B RECKLESS TERRORIST THREATS — § 947.019(1)(e)

Statutory Definition of the Crime

The making of terrorist threats, as defined in § 947.019 of the Criminal Code of Wisconsin, is committed by any person who threatens to cause the death of or bodily harm to any person or to damage any person's property and creates an unreasonable and substantial risk of (preventing the occupation of or causing the evacuation of a building)[1] (causing public inconvenience) (causing public panic or fear) (causing an interruption or impairment of governmental operations)[2] and is aware of that risk.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant threatened to cause the death of or bodily harm to any person or to damage any person's property.

   A "threat" is an expression of intention to do harm and may be communicated orally, in writing, or by conduct. This requires a true threat. "True threat" means that a reasonable person would interpret the threat as a serious expression of intent to do harm, and the person making the statement is aware that others could regard the statement as a threat and delivers it anyway. It is not necessary that the person

making the threat have the ability to carry out the threat. You must consider all the circumstances in determining whether a threat is a true threat.[3]

2. The defendant created an unreasonable and substantial risk of (preventing the occupation of or causing the evacuation of a building) (causing public inconvenience) (causing public panic or fear) (causing an interruption or impairment of governmental operations).

3. The defendant was aware of that risk.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1925B was approved by the Committee in December 2016. This revision was approved by the Committee in October 2023. It amended the definition of a "true threat" according to Counterman v. Colorado, 600 US --- (2023), to clarify that the assessment of the threat requires consideration of both the speaker's perspective (recklessness standard) and the victim's perspective (reasonable person standard).

This instruction is drafted for violations of sec. 947.019(1)(e), created by 2015 Wisconsin Act 311 [effective date: April 1, 2016]. Subsection (1)(e) requires creating "an unreasonable and substantial risk" that one of the specified harms will occur and being "aware of that risk," a standard equivalent to criminal recklessness under § 939.25. Violations of sub. (1)(a) - (d), which involve intent instead of recklessness, are addressed by Wis JI-Criminal 1925A.

The offense is a Class I felony unless the violation "contributes to any individual's death," in which case the penalty increases to a Class G felony. Sec. 947.019(2).

1. In addition to applying to a "building," the statute also applies to "dwelling, school premises, vehicle, facility of public transportation, or place of public assembly or any room within a building, dwelling, or school." The instruction is drafted for "building" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

2. The statute also applies to causing an interruption or impairment of "public communication, of transportation, or of a supply of water, gas, or other public service." The instruction is drafted for impairment of "governmental operations" because that appears to be the most comprehensive term. If one of the more specific terms applies, it should be substituted here and in the second element.

3. Other Wisconsin statutes prohibiting a "threat" have been interpreted to require a "true threat." The definition of "true threat" is based on the one used for the other criminal offenses involving threats and is derived from State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. For a complete explanation of the definition, see footnote 3, Wis JI-Criminal 1240B Threat To A Judge.

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2146A CHILD PORNOGRAPHY: POSSESSION OF OR ACCESSING A RECORDING — § 948.12(1m)

Statutory Definition of the Crime

Possession of child pornography, as defined in § 948.12(1m) of the Criminal Code of Wisconsin, is committed by one who knowingly possesses[1] or accesses in any way with intent to view any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct, knows or reasonably should know that the recording contained depictions of sexually explicit conduct, and knows or reasonably should know that the child depicted in the material has not attained the age of 18 years.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (possessed a recording) (accessed a recording in any way with intent to view it).[2]

   ["Possessed" means that the defendant knowingly[3] had actual physical control of the recording.][4]

   ADD THE FOLLOWING PARAGRAPHS IN POSSESSION CASES WHEN THEY ARE SUPPORTED BY THE

EVIDENCE:

[A recording is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the recording.]

[It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording.]

[Possession may be shared with another person. If a person exercises control over a recording, the recording is in that person's possession, even though another person may also have similar control.]

"Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

2. The recording showed a child engaged in sexually explicit conduct.

A child is a person who is under the age of 18 years.[6]

"Sexually explicit conduct" means[7] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].[8]

3. The defendant knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated _____.[9]

4. The defendant knew or reasonably should have known[10] that the person [shown in the recording] [depicted in the material] engaged in sexually explicit conduct was under the age of 18 years.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2146 in 1992 and revised in 1998, 2002, 2003, 2006, 2007, 2011, and 2012. The 2002 revision involved renumbering as Wis JI-Criminal 2146A, adopting a new format, and updating the instruction to reflect changes made in the statute by 2001 Wisconsin Act 16. The 2006 revision added a definition of "possession" to element 1. The February 2007 revision involved adding a special question at the end of the instruction and updating the Comment. The 2011 revision added to footnote 4. The 2012 revision reflected changes made by 2011 Wisconsin Acts 271 and 272. The 2019 revision amended the comment based on 2019 Wisconsin Act 16. This revision was approved by the Committee in October 2023; it updated case law citations in the comment.

This instruction is for a violation of § 948.12(1m), as amended by 2011 Wisconsin Act 271, effective date: April 24, 2012. For a violation of § 948.12(2m), created by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146B.

The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute

before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

In State v. Whistleman, 2001 WI App 189, 247 Wis.2d 337, 633 N.W.2d 249, the court held that "pictorial reproductions" as used in § 948.12, 1999-2000 Wis. Stats., included computer disks that store images of child pornography. 2001 Wisconsin Act 16 amended § 948.12 by replacing "pictorial reproduction" with "recording," defining the latter in § 948.01(3r) to include "storage of data representing an image. . ."

In State v. Multaler, 2002 WI 35, 252 Wis.2d 54, 643 N.W.2d 437, the court held that charging a separate count under § 948.12, 1997-98 Wis. Stats., for each of 28 files containing pornographic images on two computer diskettes did not violate the rule prohibiting multiplicitous charges. Also see State v. Schaefer, 2003 WI App 164, 266 Wis.2d 719, 668 N.W.2d 760.

Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a minimum sentence of 3 years for violations of § 948.12. Section 939.617 was amended by 2011 Wisconsin Act 272 [effective date: April 24, 2012] to limit the exception to the minimum sentence for violations of § 948.12 to those where the defendant "is no more than 48 months older than the child who engaged in the sexually explicit conduct." See § 939.617(2)(b).

1. Section 948.12(1m)(a) requires that "the person knows that he or she possesses the material." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowing possession."

2. Section 948.12(1m) was amended by 2011 Wisconsin Act 271 [effective date: April 24, 2012] to add "or accesses in any way with intent to view" as an alternative to possession. This change may address some of the difficulties presented by trying to apply "possession" to certain fact situations. See footnote 4 below and State v. Mercer, cited therein.

The statute prohibits possession or accessing of undeveloped film, a photographic negative, a photograph, a motion picture, a videotape, or a recording. The statute was revised by 2001 Wisconsin Act 16 [effective date: September 1, 2001] to delete reference to "pictorial reproduction" and "audio recording" and replace them with "recording." "Recording" is defined in § 948.01(3r) as follows: "'Recording' includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound." The Committee concluded that the new term "recording" is defined to include all the specific items listed in the statute. That is, undeveloped film, or a photographic negative, or a photograph, etc., is a "recording" as that term is defined in § 948.01(3r). The Committee further concluded that it is permissible to instruct the jury that, for example, "A photographic negative is a recording." This applies only to items listed in the statute; whether other items qualify as a "recording" is a factual issue for the jury to resolve.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 493, 508-09, 451 N.W.2d 752 (1990).

4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the item is arguably under the defendant's control but not directly in the physical possession of the defendant.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

Questions about "knowing possession" and "control" of a recording arise in cases involving images on a computer hard drive. In State v. Lindgren, 2004 WI App 159, 275 Wis.2d 851, N.W.2d, the court of appeals found that the evidence was sufficient to show "possession" where images were "cached" on the hard drive and there was evidence that the defendant knew that would happen when he accessed pornographic material. Lindgren adopted the rationale of U.S. v. Tucker, 305 F.3d. 1193 (10th Cir. 2002).

In State v. Mercer, 2010 WI App 47, 324 Wis.2d 506, 782 N.W.2d 125, the court held that possession of images of child pornography in violation of § 948.12(1m) can be proved by evidence from computer monitoring software showing that the defendant searched for and obtained access to web sites and viewed the images. It is not required that the defendant retained control of the images after viewing them by, for example, storing them on the computer or allowing them to remain in the computer's cache. The court's conclusion:

> . . . an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography. Whether the proof is hard drive evidence or something else, such as the monitoring software here, should not matter because both capture a "videotape" of the same behavior. And images in either place can be controlled by taking actions like printing or copying the images. ¶31.

The trial court in the Mercer case had added to the standard definition of "possession" in the instruction, giving examples of what could constitute possession:

> [p]ossessed means that the defendant knowingly had actual physical control of the recording, or that the recording is in an area over which the person has control and the person intends to exercise control over the recording.
>
> In cases involving digital images, if you are satisfied that the defendant intentionally visited child pornography websites when [sic] contained child pornography images; and (a) acted on or manipulated the child pornography image; or (b) viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file; you may find knowing possession of such images.
>
> It is not required that a person own a recording in order to possess it. What is required is that the

person exercise control over the recording. Recording means a reproduction of an image or a sound or the storage of data representing an image or a sound, including a digital image.

The court of appeals commented that this instruction "actually inured to Mercer's benefit because it gave an example fitting his theory of defense, a defense to which he was not entitled." ¶36.

For two articles providing helpful information about basic computer functioning and analysis of the "possession" of material viewed via computer, see Ty E. Howard, Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files, 19 Berkeley Tech. L.J. 1227, 1267-68 (2004); Giannina Marin, Possession of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?, 60 Fla. L. Rev. 1205, 1213-14 (2008).

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. See note 2, supra. "Means" was substituted for the phrase "includes the creation of" used in the statutory definition. No change in substance was intended.

6. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

7. Section 948.01(7) defines "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

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

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually

suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

9. The statement of the third element reflects changes made by 2011 Wisconsin Act 271 [effective date: April 24, 2012]. The change added "or reasonably should know" as an alternative to "know." It also deleted the reference to "the character and content" of the conduct and replaced it with "material that contains depictions of" sexually explicit conduct. The Committee concluded that the best way to describe this requirement to the jury is to insert the name of the type of conduct used in the preceding element.

10. The "knew or reasonably should have known" requirement is set forth in § 948.12(1m)c. This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). This element satisfies the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

11. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: possession of a recording, under sec. 948.12(1m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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2176 POSSESSION OF A DANGEROUS WEAPON BY A CHILD[1] — § 948.60(2)(a)

Statutory Definition of the Crime

Possession of a dangerous weapon by a child, as defined in § 948.60(2)(a) of the Criminal Code of Wisconsin, is committed by any child who possesses or goes armed with a dangerous weapon.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed an object.[2]

"Possessed" means that the defendant knowingly had the object under (his) (her) actual physical control.[3]

Deciding About Knowledge[4]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The object was a dangerous weapon.

A _____ is a dangerous weapon.[5]

3. The defendant had not attained the age of 18 years[6] at the time (he) (she) allegedly possessed a dangerous weapon.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 2176 was originally published in 1989 and revised in 1991, 1992, 1998, 2009, and 2011. The 2011 revision corrected a statutory cross-reference in footnote 4 to reflect a change made by 2011 Wisconsin Act 35. This revision was approved by the Committee in August 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for a violation of § 948.60(2)(a). Section 948.60 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. This instruction replaces Wis JI-Criminal 1325 which applied to what was essentially the same offense under § 941.22, 1985-86 Wis. Stats., a statute repealed by 1987 Wisconsin Act 332.

Section 948.60 was amended by 1991 Wisconsin Act 18 (see note 4, below) and by 1991 Wisconsin Act 139. The latter divided what was formerly sub. (2) into sub (2)(a) and (b). For violations of § 948.60(2)(b) involving selling a dangerous weapon to a child, see Wis JI-Criminal 2177.

The statute provides an exception for possession by a child in a course of instruction in the traditional and proper use of the weapon under adult supervision. See § 948.60(3)(a). Additional exceptions are recognized in subsections (3)(b) and (c); they were added by 1991 Wisconsin Act 18, effective date: June 8, 1991. The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schultz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

1. This instruction is for the offense defined by § 948.60(2)(a) that can be committed only by a child. Section 948.60(2)(d) provides: "A person under 17 years of age who has violated this subsection is subject to the provisions of Ch. 938 unless jurisdiction is waived under s. 938.18 or the person is subject to the jurisdiction of a court of criminal jurisdiction under s. 938.183."

2. The statute applies to any child "who possesses or goes armed with" a dangerous weapon. (Former § 941.22 referred only to "goes armed with.") By adding the alternative of simple possession, the revision appears to make "goes armed with" superfluous. To the extent the two terms have a different meaning, "possess" is the more inclusive one. See the discussion of "goes armed with" in Wis JI-Criminal 1335.

3. The definition of "possession" is based on the one provided in Wis JI-Criminal 920. That instruction also includes optional explanations for cases where an object is arguably under the defendant's control but not in his physical possession. The approach taken in Wis JI-Criminal 920 was cited with approval in State v. Allbaugh, 148 Wis.2d 807, 436 N.W.2d 898 (Ct. App. 1989).

"Knowingly" is used because inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see Wis JI-Criminal 6000, Note on the Knowledge Requirement in Controlled Substances Cases.

4. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 3, supra. The Committee concluded that sec. 948.60(2)(a) does not require proof that defendants know of the prohibition against possessing the dangerous weapon. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, "When criminal intent is an element of a crime in chapters 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.'" Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute.

5. "Dangerous weapon" is specially defined for purposes of this offense; the definition in § 939.22(10) does not apply. Section 948.60(1) provides:

> In this section, "dangerous weapon" means any firearm loaded or unloaded; any electric weapon, as defined in s. 941.295(1c)(a); metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles; a nunchaku or any similar weapon consisting of 2 sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather; a cestus or similar material weighted with metal or other substance and worn on the hand; a shuriken or any similar pointed star-like object intended to injure a person when thrown; or a manrikigusari or similar length of chain having weighted ends.

This definition is essentially a list of seven objects that constitute a dangerous weapon for purposes of this offense. The Committee recommends inserting the name of the object into the instruction rather than reading the complete statutory definition. Note that many items that would qualify as dangerous weapons under § 939.22(10) do not fall within this definition.

The definition was amended by 1991 Wisconsin Act 18 (effective date: June 8, 1991) to substitute "loaded or unloaded" for "having a barrel less than 12 inches long" immediately after the word "firearm" in the first line of the definition.

6. "Child" is defined in this way in § 948.01(1).

2650 RECKLESS DRIVING: ENDANGERING SAFETY (CRIMINAL OFFENSE) — § 346.62(2)

Statutory Definition of the Crime

Reckless driving, as defined in § 346.62(2) of the Wisconsin Statutes, is committed by one who endangers the safety of any person or property by the negligent operation of a vehicle on a highway.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated[2] a vehicle[3] on a highway[4].
2. The defendant operated a vehicle in a manner constituting criminal negligence.[5]

   "Criminal negligence" means:[6]

   - the defendant's operation of a vehicle created a risk of death or great bodily harm; and
   - the risk of death or great bodily harm was unreasonable and substantial; and
   - the defendant should have been aware that (his) (her) operation of a vehicle created the unreasonable and substantial risk of death or great bodily harm.

   IF REFERENCE TO ORDINARY NEGLIGENCE IS BELIEVED TO BE HELPFUL OR NECESSARY, SEE WIS JI CRIMINAL 925.[7]

IF EVIDENCE OF VIOLATION OF A SAFETY STATUTE HAS BEEN RECEIVED, ADD THE FOLLOWING:[8]

[Evidence has been received that the defendant violated section _____ of the Wisconsin Statutes, which provides that (summarize the statute). Violating this statute does not necessarily constitute criminal negligence. You may consider this along with all the other evidence in determining whether the defendant's conduct constituted criminal negligence.]

3. The defendant's criminal negligence endangered the safety of any person or property.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

If you find the defendant guilty, you must answer the following questions "yes" or "no":[9]

Did the violation result in bodily harm to another?

"Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.[10]

Did the violation occur in (a highway maintenance or construction area) (a utility work area) (an emergency or roadside response area) where workers are at risk from

traffic?

["Highway maintenance or construction area" means the entire section of roadway between the first advance warning sign of highway maintenance or construction work and an "END ROAD WORK" or "END CONSTRUCTION" sign or, in the case of a moving vehicle engaged in the maintenance or construction work, that section of roadway where traffic may return to its normal flow without impeding such work.][11]

["Utility work area" means the entire section of roadway between the first advance warning sign of work on a utility facility, as defined in s. 30.40 (19), or on a high-voltage transmission line, as defined in s. 30.40 (3r), and an "END UTILITY WORK" sign, where the signs are placed according to rules of the department, or, in the case of a moving vehicle engaged in work on such a utility facility or high-voltage transmission line, that section of roadway where traffic may return to its normal flow without impeding such work.][12]

["Emergency or roadside response area" means the section of roadway within 500 feet of an authorized emergency vehicle giving a visible signal or a tow truck displaying flashing red lamps, as required by s. 347.26 (6) (b).][13]

COMMENT

Wis JI-Criminal 2650 was originally published in 1967 and revised in 1978, 1985, 1988, 1995, 2010, and 2023. The 2023 revision added to the comment to reflect changes made by 2021 Wisconsin Act 115 [effective date: December 8, 2021]. This revision was approved by the Committee in August 2023; it

reflects changes made by 2023 Wisconsin Act 9 [effective date: May 12, 2023].

Section 346.62(2) was modified by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. It was affected by the homicide revision because the same definition of "criminal negligence" is used for this offense as for homicide under the revision. The effective date of the change is January 1, 1989, and this instruction is to be used in place of Wis JI-Criminal 2650 (1986) for offenses committed on or after that date. The revised statute reads as follows:

> (2) No person may endanger the safety of any person or property by the negligent operation of a vehicle.

The Judicial Council explained the change as follows:

> The revisions contained in subs. (2) and (3) are intended as editorial, not substantive, as is the substitution of a cross-reference to s. 939.25(2), stats., for the prior definition of a high degree of negligence. New sub. (4) carries forward the crime created by 1985 Wisconsin Act 293.

Judicial Council Note to § 346.62, 1987 Senate Bill 181.

The first offense under § 346.62(2) is punishable only by forfeiture of not less than $50 nor more than $400 [see § 346.65(1)(a)]; therefore, the burden of proof is to a reasonable certainty by evidence which is "clear, satisfactory, and convincing," (see § 345.45). The second and subsequent violations are punishable as crimes: a fine of $100 to $1,000 or one year in the county jail or both [see § 346.65(1)(b)]. Therefore, for second and subsequent offenses, the burden of proof must be beyond a reasonable doubt.

The instruction is drafted for the criminal offense. To adapt it for a forfeiture case, substitute "satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing" for "prove by evidence which satisfies you beyond a reasonable doubt." If the "clear, satisfactory, and convincing" standard of proof applies, an instruction for a 5/6 verdict should also be given. See Wis JI-Criminal 2055, Five-Sixths Verdict: Forfeiture Actions.

Section 346.62(5m)(a) provides for doubling the forfeiture or fine for certain violations:

> Except as provided in par. (b), if an operator of a vehicle violates s. 346.62 (2) to (4) where persons engaged in work in a highway maintenance or construction area, utility work area, or emergency or roadside response area are at risk from traffic or where sanitation workers are at risk from traffic and the operator knows or should know that sanitation workers are present, any applicable minimum and maximum forfeiture or fine specified in sub. (1), (3), (4m), or (5) for the violation shall be doubled.

Section 346.65(5m)(b) was created pursuant to 2021 Wisconsin Act 115. This section further increases penalties for violations of § 346.62(2) to (3) that occur in a highway maintenance or construction area, utility work area, or emergency or roadside response area where workers are at risk from traffic, and bodily harm occurs. Upon conviction, a driver is subject to a fine of up to $10,000 or imprisonment of up to nine months, or both, an order to perform between 100 and 200 hours of community service work, and an order to attend traffic safety school.

A similar offense is defined in § 941.01, which prohibits "endangering another's safety by a high

degree of negligence in the operation of a vehicle, not upon a highway." (Emphasis added.) See Wis JI-Criminal 1300.

1. Section 346.61 provides that § 346.62 applies to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." The instruction is drafted for a case involving operating on a highway. If a case involves operating on "premises held out to the public. . . ," the instruction must be modified. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

2. For the purposes of cases involving operating under the influence, § 346.63(3)(b) defines "operate" as follows: "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." See Wis JI-Criminal 2600 Introductory Comment, Sec. III.

3. The definition of "vehicle" provided in § 939.22(44), applies to violations of § 346.62. See § 346.62(1)(d). It provides:

> "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.

4. If a case involves operating on "premises held out for the public" rather than on a "highway," see discussion in note 2 above. Also see Wis JI-Criminal 2600 Introductory Comment, Sec. I. and Wis JI-Criminal 2605.

5. Section 346.62(1) provides: "'Negligent' has the meaning designated in s. 939.25(2)." This is a reference to the Criminal Code definition of "criminal negligence."

6. The definition of "criminal negligence" is the one provided in § 939.25, which applies to this offense. See § 346.62(1)(c).

7. Wis JI-Criminal 925 includes two additional paragraphs: one describing "ordinary negligence" and one explaining how "criminal negligence" differs.

8. The suggested instruction on the effect of violation of a safety statute is intended to comply with the decision of the Wisconsin Supreme Court in State v. Dyess, 124 Wis.2d 525, 370 N.W.2d 222 (1985). See note 6, Wis JI-Criminal 1170.

9. The Committee determined that facts that increase the range of penalties be submitted to the jury in the form of two questions concerning whether the violation resulted in bodily harm to another and whether the violation occurred in a highway maintenance or construction area, utility work area, or emergency or roadside response area where workers are at risk from traffic.

10. This is the definition of "bodily harm" provided in § 939.22(4).

11. The definition of "Highway maintenance or construction area" is the one provided in § 340.01(22e), which applies to this offense.

12. The definition of "Utility work area" is the one provided in § 340.01(73m), which applies

to this offense.

13. The definition of "Emergency or roadside response area" is the one provided in § 340.01(15pu), which applies to this offense.

OFFICE OF JUDICIAL EDUCATION
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WISCONSIN JURY INSTRUCTIONS

CRIMINAL

VOLUME IV

Wisconsin Criminal Jury Instructions Committee

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6020 DELIVERY OF A CONTROLLED SUBSTANCE — § 961.41(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to deliver[1] a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant delivered a substance.

   "Deliver" means to transfer or attempt to transfer something from one person to another.[2]

2. The substance was (name controlled substance).[3] (Name controlled substance) is a controlled substance whose delivery is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt

that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to find knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6020 was originally published in 1981 and revised in 1990, 1992, 1996, 1999, 2010, and 2018. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving the delivery of a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

The 1996 revision addressed changes made by 1995 Wisconsin Act 448. [Effective date: July 9, 1996.] The primary changes were:

(1) renumbering the statute to § 961.41;
(2) adding "distributing" to the prohibited conduct; and
(3) extending the coverage of the statute to "controlled substance analogs."

The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For

offenses involving "manufacture" see Wis JI-Criminal 6021. For offenses involving a "controlled substance analog," see Wis JI-Criminal 6020A and 6005.

It might be assumed the possession of a controlled substance is a lesser included offense of delivery of a controlled substance, but this may not be the case. In State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991), the court held that possession of a controlled substance is not a lesser included offense of reckless homicide as defined in § 940.02(2)(a). That homicide offense requires that the defendant "cause the death of another . . . by manufacture, distribution, or delivery of a controlled substance in violation of § 961.41. . . ." (Wis JI-Criminal 1021.) The Clemons court held that the strict statutory elements test for lesser included offenses was not satisfied because one can "deliver" without "possession," as where a doctor provides drugs to a person by writing an illegitimate prescription. 164 Wis.2d 506, 512. Apparently the same conclusion should apply to the delivery offense defined by this instruction.

1. Section 961.41(1) prohibits the delivery, distribution, or manufacture of a controlled substance. The instruction continues to refer only to "deliver" because that term seems to include "distribute" as well. "Distribute" is defined in § 961.01(9) as "to deliver other than by administering or dispensing . . ." For offenses involving "manufacture" see Wis JI-Criminal 6021. The penalty for the offense depends on the nature of the substance; see subsections (a)-(j) of § 961.41(1).

2. This definition was adapted from that found in § 961.01(6), which reads as follows:

> "Deliver" or "delivery," unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is any agency relationship.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not

necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance."This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

6021 MANUFACTURE OF A CONTROLLED SUBSTANCE — § 961.41(1)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to manufacture a controlled substance.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant manufactured a substance.[1]

   "Manufacture" means to produce[2] a substance.

2. The substance was (name controlled substance).[3] (Name controlled substance) is a controlled substance whose manufacture is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

   IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

   [This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the

defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6021 was originally published in 1985 and revised in 1989, 1994, 1996, 2001 and 2010. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving the manufacture of a controlled substance depend on the amount of substance involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

1. The instruction is drafted for what the Committee believes will be the most typical case – one that involves the manufacture of a substance. However, in State ex rel. Bell v. Columbia County, 82 Wis.2d 401, 263 N.W.2d 162 (1978), the supreme court held that it is the act of manufacturing that is prohibited; the state need not allege or prove that a controlled substance was actually manufactured or that the defendant possessed a manufactured controlled substance. Bell involved a challenge to the sufficiency of a complaint charging manufacture. The defendant possessed large quantities of everything needed to produce methamphetamine but none of the completed product was on the premises when the arrest took place. The defendant claimed the complaint was defective because it failed to allege that a controlled substance was actually produced. The supreme court rejected the claim.

For a case like Bell, the first element of the instruction should be modified to read as follows:

1. The defendant engaged in the act of manufacturing a substance. It is not required that a substance was actually produced.

2. Subsection 961.01(13) provides a lengthy definition of "manufacture" that lists many different alternatives. The Committee suggests selecting the type of manufacturing that is alleged to be involved in the case and specifying that type in the instruction. The instruction as drafted uses "produce" because the Committee concluded that it is likely to apply in the greatest number of cases. The complete definition in § 961.01(13) is as follows:

If there is a dispute about whether a particular action constitutes "manufacturing," a detailed definition is provided by § 961.01(13):

> "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of, or to produce, prepare, propagate, compound, convert or process, a controlled substance or controlled substance analog, directly or indirectly, by extraction from substances of natural origin, chemical synthesis or a combination of extraction and chemical synthesis, including to package or repackage or the packaging or repackaging of the substance, or to label or to relabel or the labeling or relabeling of its container. "Manufacture" does not mean to prepare, compound, package, repackage, label or relabel or the preparation, compounding, packaging, repackaging, labeling or relabeling of a controlled substance:
>
> (a) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or
> (b) By a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of or as an incident to, research, teaching or chemical analysis and not for sale.

Subsection 961.01(13) was repealed and recreated by 1993 Wisconsin Act 129, effective date: March 19, 1994. In addition to grammatical changes, one substantive revision was made: the exception for "the preparation or compounding of a controlled substance by an individual for his own use" was eliminated.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance because the Committee concluded that it adds clarity to use the name of the alleged substance throughout the instruction. Whether the substance actually is the substance named and whether the defendant actually manufactured the substance remain questions for the jury.

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

6030 POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance.[1]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a substance.

"Possessed" means that the defendant knowingly[2] had actual physical control of a substance.[3]

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE:

[A substance is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance.]

[It is not required that a person own a substance in order to possess it. What is required is that the person exercise control over the substance.]

[Possession may be shared with another person. If a person exercises control over a substance, the substance is in that person's possession, even though another person may also have similar control.]

[It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][4]

2. The substance was (name controlled substance)[5]. (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][6]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, ADD THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge or Belief

You cannot look into a person's mind to determine knowledge or belief. Knowledge or belief must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge or belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense

have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 6030 was originally published in 1976 and revised in 1987, 1990, 1995, 1996, 1998, 2001, 2010, 2011, 2013, 2014, 2016, and 2021. This revision was approved by the Committee in December 2023; it added to the Comment.

A separate instruction addresses attempts to possess a controlled substance. See Wis JI-Criminal 6031.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibits possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." Act 31 classifies them as Schedule I substances. See footnote 1.

Possession of THC becomes a felony if the offender has a prior drug conviction. See § 961.48(2). The prior conviction is not an element of the felony possession offense and the state is not required to prove the prior offense beyond a reasonable doubt at trial. State v. Miles, 221 Wis.2d 56, 584 N.W.2d 703 (Ct. App. 1998). The court characterized this penalty enhancing provision as one that is not concerned with the factual circumstances surrounding the underlying crime and that does not change the substantive nature of the charged offense. Enhancers of that type do become an element subject to jury determination. Repeater provisions like the one involved in the Miles case are in a different group.

The definition of possession offenses provided in § 961.41(3g) provides that no person may possess a controlled substance or analog "unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription . . ." The instruction does not include an element requiring that there be no prescription because the Committee concluded that this issue is properly handled in the same manner as other statutory exceptions. For example, the offense of carrying concealed weapon applies to "any person except a peace officer." § 941.23. The Wisconsin Supreme Court has concluded that whether the defendant is a peace officer, and thus exempted from the statute, is an issue that must be raised by the defendant as an affirmative defense. See State v. Williamson, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973), and the discussion in footnote 1, Wis JI-Criminal 1335.

Factual disputes about the applicability of the exception for valid prescriptions would likely be determined by pretrial motion. If a factual dispute is raised at trial, the Committee concluded that it is not an issue in the case until there is some evidence of the existence of a valid prescription. Once there is

evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of a controlled substance or a controlled substance analog if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

> An aider is immune from prosecution under s. 961.41(3g) for the possession of a controlled substance or a controlled substance analog . . . under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase "circumstances surrounding" means that the facts forming the basis for the possession of a controlled substance or a controlled substance analog charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

> An "aider" means a person who does any of the following:
>
> (a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
>
> (b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.
>
> (c) Calls the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court before trial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

(3g)(am) – a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) – a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) – cocaine or cocaine base
(3g)(d) – lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) – tetrahydrocannabinols
(3g)(em) – synthetic cannabinoids
(3g)(f) – gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) – methamphetamine

The instruction has been drafted to provide for the insertion of the specific name of the substance. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been possessed by the defendant is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been possessed by the defendant. Whether the substance actually is the substance named and whether the defendant actually possessed the substance remain questions for the jury.

2011 Wisconsin Act 31 amended § 961.41(3g) by creating sub. (3g)(em) which prohibited possession of "a controlled substance specified in s. 961.14(4)(tb) to (ty)." Those substances are nonnarcotic, hallucinogenic substances commonly known as "synthetic cannabinoids." 2013 Wisconsin Act 351 amended § 961.41(3g)(em) to refer to "a controlled substance specified in s. 961.14(4)(tb)." Act 351 also repealed and recreated sub. (4)(tb) to include the entire list of substances considered to be "synthetic cannabinoids" and repealed subsecs. (4)(te) through (4)(ty). [Effective date: April 25, 2014.]

The term "synthetic cannabinoid" does not appear in the text of sub. (3g)(em) but is used as the title of that subsection. The Committee recommends that, if the parties agree, the term be used in the instruction where it calls for "(name controlled substance)." (see discussion in footnote 5). The actual names of the "synthetic cannabinoids" as they appear in § 961.14(4)(tb) would have no meaning to the jury and are generally unpronounceable.

The state will be required to prove that the substance in question was in fact one of the chemicals designated a "synthetic cannabinoid" under § 961.14(4)(tb).

All the possession offenses listed above prohibit both "possession" and "attempts to possess." Regarding attempts, see Wis JI-Criminal 6031.

2. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414 18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 493, 508-09, 451 N.W.2d 752 (1990).

"[T]he mere presence of drugs in a person's system is insufficient to prove that the drugs are knowingly possessed by the person or that the drugs were within the person's control. . . . [However] the presence of drugs is circumstantial evidence of prior possession." State v. Griffin, 220 Wis.2d 371, 381, 584 N.W.2d

127 (Ct. App. 1998). To support a finding of possession, there must be sufficient corroborating evidence. Id.

3. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another:

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

4. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

5. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the substance possessed by the defendant tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the substance possessed by the defendant tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

If the evidence shows that the substance tested positive for tetrahydrocannabinols, note that under sec. 961.14(4)(t), tetrahydrocannabinols does not include any of the following:

1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in s. 961.38 (1n) (a) or that is possessed as provided in s. 961.32 (2m) (b).
2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
3. Tetrahydrocannabinols contained in hemp, as defined in s. 94.55 (1).
4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

6. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

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6031 ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE — § 961.41(3g)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess or attempt to possess (name controlled substance)[1]. (Name controlled substance)[2] is a controlled substance whose possession is prohibited by law.][3]

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to possess a substance.

   Attempt requires that the defendant intended to possess (name controlled substance) and did acts which indicated unequivocally that the defendant intended to possess (name controlled substance) and would have done so except for the intervention of another person or some other extraneous factor.[4]

   "Possessed" means that the defendant knowingly[5] had actual physical control[6] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][7]

2. The defendant knew or believed that the substance was [(name controlled

substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.][8]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6031 was originally published in 1995 and revised in 1996, 2010, 2014, 2015, and 2020. The 2020 revision reflected changes to the Comment made by 2019 Wisconsin Act 68. This revision

was approved by the Committee in December 2023; it added to the comment.

Section 961.41(3g) prohibits both "possession of" and "attempts to possess" controlled substances and the analogs of those substances. This instruction is drafted for a case involving a charge of attempted possession. It differs from the instruction for possession cases (see Wis JI-Criminal 6030) in that it has two elements instead of three. The second element of the possession offense – "that the substance was (name controlled substance)" – has been eliminated here. It is sufficient to constitute an attempt that the defendant intended to possess a controlled substance; it is not required that the substance in fact be a controlled substance. (See State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1995), holding that it constitutes an attempt to receive stolen property where the defendant intended to receive property that in fact was not "stolen," but which he believed to be stolen.)

1. The penalty for possession offenses varies with the type of substance possessed. The penalties are set forth in the following subsections of § 961.41(3g):

(3g)(am) — a controlled substance classified in Schedule I or II which is a narcotic drug
(3g)(b) — a controlled substance other than one classified in Schedule I or II which is a narcotic drug [except as provided in subs. (3g)(c) to (g))]
(3g)(c) — cocaine or cocaine base
(3g)(d) — lysergic acid diethylamide, phencyclidine, amphetamine, methcathinone, methylenedioxypyrovalerone, 4-methylmethcathinone, psilocin or psilocybin
(3g)(e) — tetrahydrocannabinols
(3g)(em) — synthetic cannabinoids
(3g)(f) — gamma-hydroxybutyric acid, gamma-butyrolactone, 1,4-butanediol, ketamine or flunitrazepam
(3g)(g) — methamphetamine

Note: All the penalty subsections except sub. (3g)(am) refer to "possesses or attempts to possess" – see the discussion preceding footnote 1.

2. It is helpful to instruct the jury that any statutorily listed controlled substance is a "controlled substance," as defined in § 961.01(4). The court should not, however, instruct the jury that a substance not specifically named in Chapter 961 is a controlled substance.

For example, if the evidence shows that the defendant's blood tested positive for cocaine, the jury should be instructed: "Cocaine is a controlled substance."

In contrast, if the evidence shows that the defendant's blood tested positive for "5F-AMQRZ," a non-statutorily listed synthetic cannabinoid, the jury should be instructed: "A synthetic cannabinoid is a controlled substance," not that "5F-AMQRZ" is a controlled substance. The burden is on the State to prove that 5F-AMQRZ is a synthetic cannabinoid.

If the evidence shows that the substance tested positive for tetrahydrocannabinols, note that under sec. 961.14(4)(t), tetrahydrocannabinols does not include any of the following:

> 1. Tetrahydrocannabinols contained in a cannabidiol product that is dispensed as provided in s. 961.38 (1n) (a) or that is possessed as provided in s. 961.32 (2m) (b).
> 2. Tetrahydrocannabinols contained in fiber produced from the stalks, oil or cake made

> from the seeds of a Cannabis plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of a Cannabis plant which is incapable of germination.
> 3. Tetrahydrocannabinols contained in hemp, as defined in s. 94.55 (1).
> 4. A drug product in finished dosage formulation that has been approved by the United States food and drug administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols.

3. The instruction has been drafted to provide for the insertion of the specific name of the substance. To avoid confusion, the Committee strongly suggests that only the name of the statutorily listed controlled substance be used throughout the instruction, even if the specific substance alleged to have been possessed or attempted to be possessed by the defendant is not listed in Chapter 961. For example, if the substance is heroin, "heroin," should be used throughout. Conversely, if the substance is a synthetic cannabinoid not listed by name in Section 961.14(4)(tb), "synthetic cannabinoid" should be used throughout the instruction, not the specific variation alleged to have been possessed or attempted to be possessed by the defendant. Whether the defendant actually intended to possess the substance remains a question for the jury.

4. The definition of attempt provided here is adapted from the full definition in § 939.32. The definition in § 939.32 "applies to crimes throughout the statutes and is not limited to the Criminal Code." § 939.20. The briefer definition is believed to be sufficient for most cases. If more is desired, see Wis JI-Criminal 580, Attempt. Wis JI-Criminal 580 includes an extensive Comment, including a discussion of State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), which held that proof of the existence of an "extraneous factor" is not required to establish a criminal attempt.

5. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 2, supra.

6. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so called constructive possession.

7. See State v. Dodd, 28 Wis.2d 643, 651 52, 137 N.W.2d 465 (1965).

8. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the

possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

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6035 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to deliver.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of Possession With Intent To Deliver That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

4. The defendant intended to deliver (name controlled substance).

"Deliver" means to transfer or attempt to transfer from one person to another.[5]

"Intended to deliver" means that the defendant had the purpose to deliver or was aware that (his) (her) conduct was practically certain to cause delivery.[6]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to deliver have been proved, you should find the

defendant guilty.

If you are not so satisfied, you must not find the defendant guilty of possession with intent to deliver,[8] [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41_____[9] of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to deliver before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to deliver, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.
3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][10]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6035 was originally published in 1976 and revised in 1987, 1990, 1996, 2010, and 2018. The 2018 revision added a cross reference to Wis JI-Criminal 6001 to the Comment. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving possession with intent to deliver a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

A person who holds drugs for another and intends to return the drugs to that person has the "intent to

deliver" required for a violation of § 961.41(1m). State v. Pinkard, 2005 WI App 226, 287 Wis.2d 592, 706 N.W.2d 157. "Whether Pinkard had delivered the drugs to the original owner for distribution to buyers, or to a third party for distribution to buyers, the ultimate conduct would have been the same: delivering drugs for use by others, a crime the legislature intended to punish under Wis. Stat. § 961.41(1m)." Ibid, ¶12.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme

Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

5. See section 961.01(6).

6. See section 939.23(4) and Wis JI-Criminal 923B.

7. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

> Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

8. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

9. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

10. See note 4, supra.

6036 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE [§ 961.41(1m)] WITH LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime to possess a controlled substance with intent to manufacture.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of Possession With Intent To Manufacture That the State Must Prove

1. The defendant possessed a substance.

   "Possessed" means that the defendant knowingly[1] had actual physical control[2] of a substance.

   [It is not necessary that the quantity of the substance be substantial. Any amount is sufficient.][3]

2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][4]

IF THERE IS EVIDENCE THAT THE DEFENDANT KNEW THE SUBSTANCE BY A STREET NAME, INSERT THE FOLLOWING PARAGRAPH:

[This element does not require that the defendant knew the precise chemical or scientific name of the substance. If you are satisfied beyond a reasonable doubt that (street name) is a street name for (name controlled substance) and that the defendant knew or believed the substance was (street name), you may find that the defendant knew or believed the substance was a controlled substance.]

4. The defendant intended to manufacture (name controlled substance).

"Intended to manufacture" means that the defendant had the purpose to manufacture.

"Manufacture" [means to (produce) (propagate) (compound) (convert) (process) a controlled substance] [directly or indirectly (by extraction from substances of natural origin) or (by chemical synthesis)] [includes packaging or repackaging of the substance or labeling or relabeling of its container].[5]

Deciding About Intent and Knowledge

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge. As a part of the circumstances, you may consider the quantity and monetary value of the substance.[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of possession of a controlled substance with intent to manufacture have been proved, you should find the defendant guilty.

If you are not so satisfied, you must not find the defendant guilty of possession with intent to manufacture,[7] [CONTINUE WITH THE FOLLOWING IF THE LESSER INCLUDED OFFENSE IS SUBMITTED] and you should consider whether the defendant is guilty of possession of (name controlled substance) in violation of section 961.41_____[8] of the Wisconsin Statutes.

Make Every Reasonable Effort to Agree

You should make every reasonable effort to agree unanimously on your verdict on the charge of possession with intent to manufacture before considering the offense of possession. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of possession with intent to manufacture, you should consider whether the defendant is guilty of possession of (name controlled substance).

Elements of Possession Of A Controlled Substance That the State Must Prove

1. The defendant possessed a substance.
2. The substance was (name controlled substance). (Name controlled substance) is a controlled substance whose possession is prohibited by law.

3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is prohibited by law.][9]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty of possession of a controlled substance.

You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses. If you are satisfied beyond a reasonable doubt that the defendant possessed a controlled substance with intent to manufacture, the offense charged in the information, you should find the defendant guilty of that offense, and you must not find the defendant guilty of the other lesser included offense I have submitted to you.

If you are not satisfied beyond a reasonable doubt from the evidence in this case that the defendant committed either one of the offenses I have submitted to you, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6036 was originally published in 1976 and revised in 1987, 1990, 1994, 1996, 2010, and 2018. The 2018 revision added a cross reference to Wis JI-Criminal 6001 to the Comment. This revision was approved by the Committee in December 2023; it added to the comment.

The penalty for offenses involving possession with intent to manufacture a controlled substance depends on the amount involved. An instruction for a jury finding of the amount is provided at Wis JI-Criminal 6001.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include "controlled substance analogs." See Wis JI-Criminal 6005 and 6020A.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 5.

2. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. A knowledge requirement for controlled substances cases was established by the Wisconsin Supreme Court in State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973): "[In cases involving the possession of a controlled substance] . . . the prosecution must prove not only that the defendant is in possession of a dangerous drug but also that he knows or believes that he is." 61 Wis.2d 143, 159. Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978). What is required is that the defendant either know the identity of the substance or, not knowing the precise identity, know that the substance is a substance which is controlled by law. A more complete discussion of the knowledge requirement is found at Wis JI-Criminal 6000.

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme

Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

5. The definition of "manufacture" is based on the one provided in § 961.01(13). See note 3, Wis JI-Criminal 6021.

6. Subsection 961.41(1m) provides as follows with respect to intent to manufacture or deliver:

> Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation.

7. Wis JI-Criminal 6035 includes an instruction for a finding on the lesser included offense of simple possession. Of course, it is to be used only if a reasonable interpretation of the evidence supports the instruction. See SM-6, Instructing the Jury on Lesser Included Offenses, for a discussion of the evidentiary standard. The transitional material leading into the finding on the lesser included offense is adapted from Wis JI-Criminal 112A.

8. In the blank, insert the appropriate statutory subsection. It will vary depending on the nature of the substance possessed. See note 1, Wis JI-Criminal 6030.

9. See note 4, supra.

6038 ACQUIRING POSSESSION OF A CONTROLLED SUBSTANCE BY MISREPRESENTATION — § 961.43(1)(a)

Statutory Definition of the Crime

The Wisconsin Statutes[1] make it a crime to acquire possession of (name controlled substance)[2] by misrepresentation.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained possession of a substance.[3]

   "Possession" means that the defendant knowingly[4] had actual physical control of a substance.[5]

2. The substance was (name controlled substance).[6] (Name controlled substance) is a controlled substance whose possession is regulated by law.

3. The defendant believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the possession of which is regulated by law.][7]

4. The defendant obtained possession of the substance by misrepresentation made with the intent to deceive another and with intent to induce that person to rely and

act thereon.[8]

This element requires that the defendant intended to deceive (name person) and intended to induce (name person) to rely and act on the misrepresentation.

5. (Name person) was deceived by the misrepresentation.

This requires that (name person) must have been induced to and did in fact part with possession of the (name controlled substance) in reliance upon the misrepresentation.

Deciding About Belief and Intent

You cannot look into a person's mind to find belief or intent. While belief and intent must be found as a fact before you can find the defendant guilty, they must be found, if found at all, from any acts, words, or statements bearing upon belief and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 6038 was originally published in 1983 and revised in 1987, 1995, 1996, 2007, 2010. This revision was approved by the Committee in December 2023; it added to the comment.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996.

1. Section 961.43(1)(a) provides that it is unlawful for any person to "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge."

2. The instruction has been drafted to provide for the insertion of the specific name of the substance as alleged in the information. The Committee has concluded that it adds clarity to use the name of the alleged substance throughout the instruction, although whether the defendant actually possessed the substance remains a question for the jury (see the second element).

3. Although it should rarely be in issue with respect to this offense, it is not required that a substantial amount of the substance be obtained – any amount is sufficient. See State v. Dodd, 28 Wis.2d 643, 651-52, 137 N.W.2d 465 (1965).

4. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). Also see note 6, supra.

5. The definition of "possess" is that found in Wis JI-Criminal 920 and requires "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

> [An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
> [It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
> [Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

6. The instruction has been drafted to provide for the insertion of the specific name of the substance. The Committee concluded that it adds clarity to use the name of the alleged substance from this point on in the instruction. Whether the substance actually is the substance named and whether the defendant actually delivered the substance remain questions for the jury. The identity of a controlled substance may be proved without an expert, by circumstantial evidence. State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993).

7. The defendant must believe that the substance was a controlled substance. State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). Knowledge of the precise chemical name is not required. Lunde v. State, 85 Wis.2d 80, 270 N.W.2d 180 (1978).

While proof of knowledge is required for conviction, an information which charges the offense in the words of the statute (thereby omitting an allegation of knowledge) is sufficient to confer subject-matter jurisdiction, at least where there is no timely objection or showing of prejudice. State v. Nowakowski, 67 Wis.2d 545, 227 N.W.2d 497 (1975).

While the instruction suggests using the actual name of the substance for purposes of clarity, it is not necessary that the defendant know that name. Therefore, with respect to the third element, the name should be included only when there is no dispute about the defendant's knowledge or when the state is undertaking to prove that the defendant did know the identity of the substance. Otherwise, the more general alternative should be used: that the defendant knew the substance was a controlled substance.

The State need not prove the defendant knew the scientific name or the precise nature of the substance as long as they knew the substance was a "controlled substance." This rule, articulated in State v. Smallwood, 97 Wis.2d 673, 677-678, 294 N.W.2d 51 (1980), was confirmed by the Wisconsin Supreme Court in State v. Sartin, 200 Wis. 2d 47, 546 N.W.2d 449 (1996).

The court in Sartin also expressly overruled any language in Smallwood that suggests that a different rule might apply where the actual and perceived substances are placed in different schedules and wield dissimilar penalties. The proof of the nature of the controlled substance is, in the statutory scheme, only material to the determination of the penalty to be applied upon conviction. 200 Wis.2d 47, 61.

A more complete note on the knowledge requirement is found at Wis JI-Criminal 6000.

8. The explanation of the fourth element was adapted from the elements of theft by fraud set forth in § 943.20(1)(d).

6070 USE OR POSSESSION OF A MASKING AGENT — § 961.69(2)

Statutory Definition of the Crime

The Wisconsin Statutes make it a crime for a person to use, or possess with the primary intent to use, a masking agent.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant [used] [possessed with the primary intent to use] a substance or device.

   ["Possessed" means that the defendant knowingly[1] had actual physical control of a substance or device.[2]]

Deciding About Knowledge[3]

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

2. The substance or device was a masking agent.

   A masking agent is any substance or device that is intended for use to defraud, circumvent, interfere with, or provide a substitute for a bodily fluid in conjunction

with a lawfully administered drug test.[4]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI Criminal 6070 was originally published in 2016 and revised in 2021. This revision was approved by the Committee in October 2023; it incorporated a paragraph about "Deciding About Knowledge" and added to the comment.

This instruction is for possession or use of a masking agent in violation of § 961.69(2), which was created by 2015 Wisconsin Act 264, effective date: March 19, 2016. Subsection (3) of § 961.69 prohibits delivery, possession with intent deliver, or manufacturing with intent to deliver, a masking agent. Subsection (4) prohibits placing an advertisement to promote the sale of a masking agent. Uniform instructions have not been drafted for violations of subs. (3) and (4).

2013 Wisconsin Act 194 [effective date: April 9, 2014] created § 961.443. Under § 961.443, a defendant is entitled to immunity from criminal prosecution for possession of a masking agent if the charge stems from the act of rendering aid to a person believed to be suffering from a drug overdose. Specifically, § 961.443(2) provides:

> An aider is immune from prosecution under under s. 961.69(2) for possession of a masking agent under the circumstances surrounding or leading to his or her commission of an act described in sub. (1).

The phrase "circumstances surrounding" means that the facts forming the basis for the possession of a masking agent charge must be closely connected to the events concerning the defendant rendering aid to an individual suffering from a drug overdose. State v. Lecker, 2020 WI App 65, 394 Wis.2d 285, 294, 950 N.W.2d 910.

An "aider" means a person who does any of the following:

> (a) Brings another person to an emergency room, hospital, fire station, or other health care facility and makes contact with an individual who staffs the emergency room, hospital, fire station, or other health care facility if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any

controlled substance or controlled substance analog.

(b) Summons and makes contact with a law enforcement officer, ambulance, emergency medical services practitioner, as defined in s. 356.01(5), or other health care provider, in order to assist another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog.

(c) Calls the telephone number "911" or, in an area in which the telephone number "911" is not available, the number for an emergency medical service provider, and makes contact with an individual answering the number with the intent to obtain assistance for another person if the other person is, or if a reasonable person would believe him or her to be, suffering from an overdose of, or other adverse reaction to, any controlled substance or controlled substance analog. Wis. Stat. § 961.443(1).

The legislature did not expressly provide in Wis. Stat. § 961.443 who should make the immunity decision and when that decision should be made. However, in State v. Williams, 2016 WI App 82, 372 Wis.2d. 365, 888 N.W.2d 1, the court held that the determination of immunity is to be made by the circuit court pretrial, not by the fact finder at trial. The burden is on the defendant to prove by a preponderance of the evidence that he or she is entitled to immunity. Id. at ¶14.

1. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927); Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

2. "Possess" is defined in Wis JI-Criminal 920 to require "actual physical control." That instruction also contains the following optional paragraphs for use where the object is not in the physical possession of the defendant or where possession is shared with another:

[An item is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item.]
[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]
[Possession may be shared with another person. If a person exercises control over an item, that item is in his possession, even though another person may also have similar control.]

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

3. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 1, supra. The Committee concluded that sec. 961.69(2) does not require proof that defendants know of the prohibition against possessing a masking agent. This conclusion is based on sec. 939.23(1).

4. This is the definition of "masking agent" provided in § 961.69(1).

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SM-6 JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES

CONTENTS

Scope

This Special Material attempts to provide a framework for deciding when it is proper to instruct the jury on a lesser included offense. There are two tests to consider: first, whether an offense is a lesser included offense of the crime charged; and second, whether the evidence supports an instruction on the lesser included offense. If both tests are satisfied, an instruction must be given upon request of either party.

I. When is a crime a lesser included offense of the charged crime?

The authority for convicting a defendant of a lesser included offense and the standard for determining when an offense is "lesser included" are found in § 939.66 of the Wisconsin Statutes:

> 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 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 ss. 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).

The principle which allows conviction for a lesser included offense upon an information charging a greater offense is that the defendant has received adequate notice of the lesser offense since it does not require proof of any fact not required for the greater.[1]

In order to instruct the jury on a lesser included offense, the offense must qualify under one of the subsections of § 939.66. A trial court is not permitted to instruct or submit a verdict on a lesser crime which is not included in the charged crime.[2] The subsections of § 939.66 are an exhaustive list of the categories of lesser included offenses; if an offense does not fit within one of these categories, it is not "lesser included" and it may not be submitted to the jury.

The subsections of § 939.66 break down into two groups. One group states general principles relating to lesser included offenses that can apply across the range of criminal statutes. Consisting of subsections (1), (2), (3), and (4), this group has been part of the statute since it was originally enacted as part of the 1956 Criminal Code revision. The rest of the subsections constitute the second group which states special rules for specific statutes or groups of statutes. Only subsection (5) was part of § 939.66 as originally enacted. These special rules have become necessary for two reasons. First, the general lesser included offense rules are strictly interpreted to focus solely on the statutorily-defined elements

rather than on the facts of the case. (See the discussion below.) Second, new criminal statutes tend to be drafted in a way that does not follow the principles of the 1956 Criminal Code revision. The result is that the general principles do not identify offenses that should logically be included offenses, making special rules necessary.

The discussion below considers each of the general rules and then the special rules as a group.

A. Section 939.66(1): "A crime which does not require proof of a fact in addition to those which must be proved for the crime charged."

The key to applying this subsection is understanding that it is concerned with the statutorily required elements of the crimes and not with the particular facts alleged or proved in the case at hand.[3] "When determining whether a crime is a lesser included offense under sec. 939.66(1), the determinative factor is the statutorily defined elements of the respective crimes."[4] Language in earlier decisions of the Wisconsin Supreme Court, especially State v. Melvin,[5] implicitly approving consideration of the peculiar facts of the case in determining lesser included offenses, has not been followed in subsequent cases,[6] and the strict "statutory elements" test now appears to be clearly established.

In properly applying § 939.66(1), one must compare the statutory definition of the charged crime with the statutory definition of the alleged lesser included crime. If the lesser crime includes any element not included in the definition of the charged crime, the lesser crime is not an "included" offense.

Thus, in Randolph v. State,[7] where the facts involved the shooting of the victim by the defendant, it was held that injury by conduct regardless of life and reckless use of a weapon were not included in the crime of attempted murder. Both the lesser offenses require proof of facts not required for attempted murder. Injury by conduct regardless of life requires proof of injury; reckless use of a weapon requires proof that a weapon was used. Attempted murder requires proof of neither injury nor use of a weapon, although both facts were part of the case against Randolph.

Other illustrations of the "statutory elements" test are found in the following cases:

- State v. Verhasselt[8] – injury by negligent use of a weapon is not included within injury by conduct regardless of life;
- State v. Smith[9] – pointing a weapon is not included within armed robbery;
- State v. Driscoll[10] – indecent liberties with a child is not included within sexual

intercourse with a child;

- State v. Elbaum[11] – resisting an officer is not included within battery to a police officer.

- State v. Hagenkord[12] – injury by conduct regardless of life is not an included offense when the charge is first degree sexual assault.

- State v. Carrington[13] – reckless use of a weapon, in violation of § 941.20(1)(a) is not a lesser included offense of endangering safety while armed, in violation of § 941.30 and § 939.63(1).

- State v. Peck[14] – possession of a controlled substance is not a lesser included offense of manufacturing a controlled substance.

- State v. Martin[15] – battery is not a lesser included offense of second degree sexual assault [sexual contact] under § 940.225(2)(a).

- State v. Clemons[16] – possession of a controlled substance is not a lesser included offense of first degree reckless homicide under § 940.02(2)(a), causing death by the delivery of a controlled substance.

- State v. Rundle[17] – reckless child abuse causing great bodily harm under § 948.03(3)(a) is not a lesser included offense of intentional child abuse causing bodily harm under § 948.03(2)(b).

In many of these situations, it can be argued that the strict "statutory elements" test leads to an unfair, or at least excessively rigid, result. (Some of the rigidity is relieved by other subsections of § 939.66 which are discussed below.) This rigidity or unfairness is compounded by the fact that the lesser included offense test has also been adopted for the purposes of determining when multiple convictions are possible. See, for example, State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 660 (1971). Under this rule, multiple convictions are allowed whenever one offense is not "included" within the other under the definition of § 939.66.[18]

The "elements only" approach and alternative lesser included offense tests were thoroughly reviewed in State v. Carrington.[19] The Wisconsin Supreme Court reaffirmed the "elements only" test but acknowledged two qualifications. First, a "penalty enhancer" may be considered in determining what the statutory elements of the charged offense are. Thus, a charge of endangering safety by conduct regardless of life, with the addition of the penalty enhancer provided in § 939.63 – while possessing or using a dangerous weapon –

includes an element of possessing or using a dangerous weapon which becomes part of the lesser included offense analysis. Second, the Carrington decision acknowledged that the charging document may be referred to in one situation: where a statute provides alternative elements, courts should look to the charging document to determine the greater crime to which the elements only test applies.[20]

Wisconsin is not alone in its commitment to the strict statutory elements test. In United States v. Schmuck, 840 F.2d 384 (7th Cir. 1988), the court, en banc, reversed a panel decision and reaffirmed that the strict "comparison-of-the-elements" test is the proper one to use in federal prosecutions in the 7th Circuit. The panel had adopted a more flexible, "inherent relationship" test, which allowed consideration of the facts alleged in the charge and the evidence presented. The en banc opinion held that the elements test is better for three reasons: 1) it is more consistent with the "necessarily included" standard in Rule 31(c) of the Federal Rules of Criminal Procedure; 2) it avoids problems in giving notice to the defendant; and 3) it is consistent with the test used for double jeopardy purposes. The en banc decision was affirmed by the United States Supreme Court, with the Court emphasizing that the comparison-of-the-statutory-elements test is what is required by Rule 31(c). The court also found that the

> elements test is far more certain and predictable in its application than the inherent relationship test . . . [it] permits both sides to know in advance what jury instructions will be available . . . [and] promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of reference.

United States v. Schmuck, 489 U.S. 705, 720-21 (1989)

B. Section 939.66(2): "A crime which is a less serious type of criminal homicide than the one charged."

Section 939.66(2) provides a special standard for homicides: all less serious types of criminal homicide are considered to be included within all more serious types of homicide. The evidence must support the giving of the instruction on the lesser offense, but in the proper case, instruction on any homicide offense could be proper, even though the "statutory elements" test of § 939.66(1) is not satisfied.[21]

This rule can be applied without difficulty in most cases. The Wisconsin Supreme Court has compared the maximum penalties to determine if one homicide is less serious than another. State v. Davis, 144 Wis.2d 852, 425 N.W.2d 411 (1988). Thus, for any given homicide offense, all other homicides with lower maximum penalties are included crimes

and should be submitted to the jury if the evidentiary standard is satisfied.

Determining when one homicide is "less serious" than another has become more complicated than one would expect it to be because some homicide offenses have the same penalty. For example, both second degree intentional homicide under § 940.05 and first degree reckless homicide under § 940.02(1) are Class B felonies; both second degree reckless homicide under § 940.06 and homicide by intoxicated use of a vehicle under § 940.09(1) are Class D felonies. In State v. Wolske, 143 Wis.2d 175, 420 N.W.2d 60 (Ct. App. 1988), convictions for a count of negligent homicide and a count of homicide by intoxicated use of a vehicle for each victim of the defendant's operation of a boat were upheld. The court held that the crimes have different elements and that since the penalties were the same, one was not "less serious" than the other. The specific situation addressed in Wolske will not recur because penalties have changed. But the same situation can arise with other statutes.

In State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909, the defendant gave a controlled substance to a 17-year-old girl and she died as a result of using the substance. Patterson was convicted of 1st degree reckless homicide under § 940.02(2) and of contributing to the delinquency of a child with death as a consequence under § 948.40(4)(a). The court affirmed the two convictions, concluding the offenses are not "multiplicitous" because they require proof of different facts. Further, the court concluded that contributing to the delinquency of a child with death as a consequence is not a "less serious type of criminal homicide" for purposes of Wis. Stat. § 939.66(2). "Rather than being a homicide statute, Wis. Stat. § 948.40(4)(a) is more akin to other offenses spread throughout the statutes that proscribe certain conduct and impose a more serious punishment where death results. . . [T]he legislature did not intend contributing to the delinquency of a child with death as a consequence to be a type of criminal homicide." Patterson, ¶¶24, 25.

Non-homicide offenses may also be lesser included offenses of homicides but to so qualify, they must satisfy one of the other subsections of § 939.66.

C. Section 939.66(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."

The threshold requirement for application of § 939.66(3) is that the lesser crime be "the same as" the crime charged, except for the recklessness or intent element. This requirement has been interpreted to involve the same strict comparison of statutory elements that applies under § 939.66(1). Therefore, subsection (3) does not apply where the lesser offense involves any element not contained within the charged offense.[22] For

example, first degree reckless injury, requiring "criminal recklessness" and "utter disregard for human life" is not the "same crime" as aggravated battery and does not meet the test under sub. (3).[23]

The second requirement for the application of subsection (3) is that the charged offense must require a showing of criminal intent. Under the Criminal Code, when criminal intent is an element of a crime it is indicated by the terms "intentionally," "with intent to," "with intent that," or by forms of the verbs "know" or "believe."[24] If none of these "intent words" appear in the statute defining the greater offense, subsection (3) does not apply.[25]

A third requirement for the application of subsection (3) is that the lesser offense require "recklessness or negligence." When recklessness is an element of a crime, it is indicated by the term "reckless" or "recklessly." See § 939.24(2). When criminal negligence is an element of a crime, it is indicated by the term "negligent." See § 939.25(2).

D. Section 939.66(4): "An attempt in violation of § 939.32 to commit the crime charged."

An attempt to commit the charged crime is always a lesser included offense under subsection (4). An implicit qualification on this rule is that the attempt must in fact be a crime. This qualification was recognized by the Wisconsin Supreme Court in State v. Melvin,[26] where the court held that a defendant was not entitled to an instruction on attempted homicide by reckless conduct because there was no such offense; one cannot attempt to commit a crime which only requires reckless conduct.[27]

Note that several crimes are defined to punish an attempt equally with the completed crime: § 161.41, Possession of a Controlled Substance; §§ 940.41-.49, Intimidation of Witnesses and Victims; § 948.07, Child Enticement; and § 948.605(3), Discharge of Firearm in a School Zone. In these situations, of course, the attempt is not lesser included with respect to the completed crime.

E. The crime-specific provisions.

Several subsections of § 939.66 declare specific offenses to be included crimes of other offenses. These have become necessary to preserve lesser included offenses where they are logically appropriate but where the statutory drafting style and the strict statutory elements test combine to eliminate them. The individual subsections are discussed briefly below.

1. Section 939.66(2m): "A crime which is a less serious or equally serious type of battery than the one charged."

This provision was created in 1987, apparently in response to the decision in State v. Richards,[28] which applied the strict comparison-of-the-statutory-elements test to hold that simple battery was not a lesser included offense of aggravated battery. Since that time, § 940.19, the principal battery statute, has been extensively revised and numerous special battery statutes have been created. See §§ 940.20, 940.201, 940.203, 940.205, 940.207, and 940.208.

In determining whether one battery offense is "less serious" than another, the appropriate test is probably the same as that used for homicide offenses: comparing the maximum penalties. (See the discussion of § 939.66(2) in section I. B., above.) Note that unlike the similar provision for homicides in § 939.66(2), this subsection includes "equally serious" types of battery – that is, those with the same penalties.

2. Section 939.66(2p): "A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged."

This subsection relates to sexual assault of a child. As amended by 2007 Wisconsin Act 80, § 948.02 defines five first degree offenses [one Class A felony and four Class B felonies], one second degree offense [Class C felony], and one offense involving failure to act by a person responsible for the welfare of a child [Class F felony].

3. Section 939.66(2r): "A crime which is a less serious type of violation under s. 943.23 than the one charged."

This subsection relates to offenses defined in the statute titled, "Operating a Vehicle Without the Owner's Consent." (Included are offenses referred to as "carjacking." See § 943.23(1g).) The maximum penalties are compared to determine whether an offense is "less serious."[29]

4. Section 939.66(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 § 948.22(2)."

This subsection relates to the felony nonsupport offense prohibited by § 948.22(2) and the misdemeanor offense defined in sub. (3) of the same statute. The distinguishing feature is the duration of the failure to pay support: if it is 120 days or more, the offense is a felony; if less than 120 days, the offense is a misdemeanor.

5. Section 939.66(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."

Under this subsection, attempted battery is an included offense of sexual assault, sexual assault of a child, robbery, mayhem, and aggravated battery, and of an attempt to commit any of those offenses, even though attempted battery may require proof of elements not contained in the enumerated offenses. The Wisconsin Supreme Court has held that this subsection limits attempted battery as an included offense only of the offenses listed.[30] This may be an overstatement, since attempted battery may well be an included offense of crimes not enumerated in subsection (5) if other subsections of § 939.66 are satisfied. For example, it would be an included crime under subsection (4) where battery is charged.

6. Section 939.66(6): "A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30."

The "crime[s] specified in s. 940.285(2)(b)4. or 5." are misdemeanor offenses involving abuse of individuals at risk. This provision makes them included offenses of felony battery crimes [§ 940.19(2) to (6)], first, second, and third degree sexual assault [§ 940.225(1), (2), or (3)], and false imprisonment [§ 940.30].

7. Section 939.66(6c): "A crime that is a less serious type of violation under s. 940.285 than the one charged."

Section 940.285 defines several different offenses involving the abuse of individuals at risk. The maximum penalties are compared to determine whether an offense is "less serious."[31]

8. Section 939.66(6e): "A crime that is a less serious type of violation under s. 940.295 than the one charged."

Section 940.295 defines several different offenses involving the abuse and neglect of patients and residents of various facilities. The maximum penalties are compared to determine whether an offense is "less serious."[32]

9. Section 939.66(7): "The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)."

"The crime specified in s. 940.11(2)" is hiding or burying a corpse; the "crime specified in s. 940.11(1)" is mutilating, disfiguring, or dismembering a corpse.

II. If an offense is "lesser included," when is it proper to submit an instruction on that offense?

Once it has been determined that a crime is a lesser included offense of the charged crime, the trial judge must decide whether the evidence warrants the giving of the instruction. The evidentiary standard is necessary because juries are not to be given the discretion to pick and choose the offense of which the defendant should be found guilty.[33] "Juries cannot rightly convict of the lesser merely from sympathy or for the purpose of reaching an agreement. They are bound by the evidence. . . ."[34]

A. The general rule.

The evidentiary standard for determining when the instruction on the lesser crime should be given was stated as follows in Zenou v. State:

> . . . . if the evidence, in one reasonable view, would suffice to prove guilt of the higher degree beyond a reasonable doubt, and if, under a different, but reasonable view, the evidence would suffice to prove guilt of the lower degree beyond a reasonable doubt, but leave a reasonable doubt as to some element included in the higher degree but not in the lower, the court should, if requested, submit the lower degree as well as the higher.[35]

The court in Zenou went on to describe why the lesser included offense instruction is proper when this test is met:

> . . . . Both the state and the defendant have a right to have the lower degree submitted so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree. Ordinarily, if a court is in doubt, it should submit both degrees upon request.[36]

The test has been upheld in the face of a challenge to its constitutionality. In Ross v. State,[37] the court rejected the defendant's contention that an instruction should be given whenever there is any evidence probative of the lesser offense.[38] The court held that the test did not deny the defendant due process by requiring that there be a reasonable basis in the evidence for the instruction on the lesser offense. To add instructions on offenses not supported by a reasonable basis would not be in the defendant's interest, said the court, since it would make compromise verdicts more likely in cases where acquittal would otherwise have been proper.

In State v. Bergenthal, the court elaborated on the application of the evidentiary standard:

> The key word in the rule is "reasonable." The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury. Only if "under a different, but reasonable view," the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury. However, there is not to be read into the rule the requirement that "there are not reasonable grounds on the evidence to convict of the greater offense." That goes too far. Where the defendant is able to demonstrate that there is no reasonable view of the evidence that warrants conviction on the greater offense, and the trial court agrees, there remains no issue on such charge to go to the jury. The purpose of multiple verdicts is to cover situations where under different, but reasonable, views of the evidence there are grounds either for conviction of the greater or of the lesser offense. The lesser degree verdict is not to be submitted to the jury unless there exists reasonable grounds for conviction of the lesser offense and acquittal on the greater.[39]

There are, therefore, two requirements established by the evidentiary standard: 1) reasonable grounds for acquittal on the offense charged (and on other instructed offenses greater than that requested); 2) reasonable grounds for conviction on the lesser offense requested. In assessing the "reasonableness," the evidence should be viewed in the light most favorable to the defendant.[40]

In homicide cases, where all less serious types of homicide are included crimes under § 939.66(3), there must be reasonable grounds for acquittal on all degrees of homicide which are more serious than the offense on which an instruction is requested.[41] However, in at least one situation, full application of this test is not necessary: where the evidence supports instructing on the complete privilege of self defense, an instruction on "imperfect self defense" should always be submitted on request.[42] Thus, in a case where first degree intentional homicide is charged and the evidence supports submitting the complete privilege of self defense, an instruction on second degree intentional homicide under § 940.01(2)(b) (unnecessary defensive force) is always appropriate. A similar situation occurs where first degree intentional homicide is charged and the evidence supports an instruction on the defense of voluntary intoxication: it is error to refuse to instruct on first degree reckless homicide as a lesser included offense.[43]

B. A "reasonable view of the evidence" and inconsistent defenses.

Questions may arise in applying the general evidentiary rule in cases where submitting the lesser included offense appears to be inconsistent with defense testimony or the apparent defense theory of the case. For example, should a lesser offense involving recklessness be submitted where a defendant charged with an intentional crime claims to

have acted in self defense? Or, should a lesser offense be submitted where the defense is entirely exculpatory?[44]

In the Committee's judgment, these questions are best resolved by applying the general test to all the evidence by deciding whether a reasonable view of the evidence supports any lesser included offense instruction that is requested. Trial courts "must recognize the fact that a jury could disbelieve the defendant's version of the facts."[45] Courts should look at all the evidence and the reasonable inferences it supports to determine what offenses are supported by different, but reasonable, views of that evidence.[46]

In State v. Thomas,[47] the Wisconsin Court of Appeals stated this rule in the following way:

> We hold that the defendant or the state may request and receive lesser included offense instructions, even when the defendant has given exculpatory testimony, if under a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge.

III. The necessity of a request for a lesser included offense instruction; the trial judge's sua sponte authority or obligation to give such an instruction.

A. The general rules.

Wisconsin case law establishes three general rules relating to the trial judge's duty and authority to instruct on lesser included offenses. Assuming that an offense qualifies as "included" under § 939.66 and that the evidentiary test is satisfied, the following rules apply.

First, it is error not to submit the lesser included offense if requested by the state or the defendant.[48] Both the state and the defendant have the right to request that a lesser offense be submitted, "so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree."[49] If the state requests an instruction on a lesser included offense and the evidentiary test is met, an instruction is required, even if the defendant opposes it.[50]

Second, in the absence of a request by the state or the defendant, it is not error for the trial court to fail to instruct on a lesser included offense.[51] This is the general rule for all sua sponte instructions in Wisconsin[52] and contrasts with the duty of California trial judges, for example, who must instruct on all "general principles of law" even in the absence of a request.[53] In California this duty extends to lesser included offenses[54] and is apparently

intended to protect the defendant from incompetent counsel.[55]

Third, if no request has been made, Wisconsin trial courts apparently have the authority, as opposed to the duty or obligation, to instruct on a lesser included offense. The Wisconsin Supreme Court has held that "(t)he determining of instructions is not entirely within the control of the defendant because the court may without any request instruct on the degrees of the offense the evidence will sustain. . . ."[56]

While these general rules sound clear, reconciling them with each other and with other principles raises some difficult issues.

B. No duty to instruct sua sponte versus "plain error."

The Wisconsin rule appears to eliminate the trial judge's obligation to give lesser included offense instructions sua sponte,[57] but this may not be the case in practice. This is because failure to instruct, even in the absence of a request, may be reviewed by an appellate court and may be grounds for reversal where it amounts to "plain error."[58] Further, instructions which "misstate the law" may also be reviewed in the absence of proper objection.[59] It is likely that the failure to instruct on a lesser included offense that is fairly raised by the evidence could be characterized as "affecting substantial rights" or that instructions which omit a fairly raised lesser included offense could be characterized as "misstating the law." Thus, although the Wisconsin trial judge is not specifically required to give an instruction on a lesser included offense in the absence of a request, it may be a good idea for the judge to explore the issue in a proper case. The possible problems with doing so are discussed below.

C. Sua sponte instructions versus trial strategy.

One of the primary reasons for the Wisconsin rule requiring a request for a lesser included offense instruction is the recognition that requesting or not requesting a lesser included offense instruction is largely a matter of trial strategy.[60] The theory is that the defendant may choose to test the state's evidence on the greater offense and take the chance that it will be found to be insufficient, requiring an acquittal. For the trial judge to instruct on an included crime where the defendant has chosen to go "all or nothing" on the charged crime alone may raise questions of unfair interference with trial strategy.

D. Anticipating problems at the instruction conference.

The Committee recommends that the possible problems regarding the submission of lesser included offenses be anticipated and dealt with at the instruction conference. The defendant must be present; the conference must be recorded and should raise all appropriate

considerations. It is good practice to ask the state and the defendant if instructions on lesser included offenses are requested.[61] If requests are not made for offenses that the trial judge believes may be raised by the evidence, specific inquiry should be made regarding the defendant's strategic decision not to request submission of that offense. The Committee recommends that the defendant be addressed personally in this regard even though the Wisconsin Supreme Court has held that a defendant is bound by counsel's decision not to request an instruction.[62] Given the potential importance of the decision[63] and the close relationship of the judge's sua sponte instruction authority[64] to the need to protect defendants from ineffective counsel, it may be significant to have the record indicate that the defendant fully participated in the decision.[65]

IV. Instructing the jury on the transition between the charged crime and a lesser included crime.

Wis JI-Criminal 112 and 122[66] offer suggested uniform instructions for the transition between the instruction on the charged crime and the instruction for a lesser included crime. The specific issue with which these instructions deal is what result must be reached with regard to the charged crime before moving on to the included crime. The objective is to advise the jury of its options without having any coercive effect on free deliberation.

Wis JI-Criminal 112 and 122 resolve the issue by advising the jury to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime. This advice is contained in the following paragraph:

> You should make every reasonable effort to agree unanimously on your verdict on the charge of (name charged crime) before considering the offense of (name lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the offense of (name charged crime), you should consider whether the defendant is guilty of (name lesser included crime).[67]

The basis for this instruction is the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion has not been explicitly adopted by the Wisconsin Supreme Court,[68] but is implicit in two earlier decisions[69] and has been adopted in other states.[70]

At the other extreme from requiring unanimity on the charged crime is to allow the jury to consider any of the submitted offenses without regard to sequence. This theory was rejected on the ground that it is reasonable to ask that the jury's attention first be focused on the charged crime.

V. Other issues.

A. Instructing on an offense for which the statute of limitations has run.

In State v. Muenter, 138 Wis.2d 374, 406 N.W.2d 415 (1987), the Wisconsin Supreme Court held that an instruction should be given on a lesser included offense even if the statute of limitations has run on that crime. Muenter was charged with several felonies in violation of the State Banking Code. The jury was instructed on lesser included misdemeanor offenses on which the statute of limitations had run and found the defendant guilty of those misdemeanors. On appeal, the court held that "the running of the statute of limitations does not preclude the jury from reaching a verdict convicting the defendant of a crime; it rather precludes the trial court from entering a judgment of conviction on the finding of guilt."[71] The court concluded that this result does not "work a fraud upon the jury's verdict." The evidentiary support for submitting the lesser included offense must, of course, still exist.[72]

B. Attorney argument regarding lesser included offenses.

In State v. Neuser, 191 Wis.2d 131, 528 N.W.2d 49 (Ct. App. 1995), a conviction was reversed because the prosecutor engaged in improper argument regarding the court's submission of a lesser included offense. The following remarks were made: "As to the lesser included offense, the court did not submit that. The defense requested that and the court granted the request. It's not the court ordering that it be done." 191 Wis.2d 131, 137. The court of appeals held that this statement was improper for two reasons: it misstated the law, and it presumed to speak for the trial court. The court described the proper scope of argument:

> The question of whether a lesser included offense is to be submitted is a legal issue which is resolved between the court and counsel. It does not involve the jury, and the proceedings relative to the question are not played out before the jury. With the court having made that decision, it is not within the province of either counsel to opine to the jury why the court may have chosen to do so. Rather, the role of counsel is to argue whether the evidence supports the greater, the lesser or neither charge.

191 Wis.2d 131, 138.

COMMENT

Wis JI-Criminal SM-6 was originally published in 1980 and revised in 1995 and 2014. This revision

was approved by the Committee in August 2023; it amended formatting errors.

1. Remington and Joseph, "Charging, Convicting, And Sentencing The Multiple Criminal Offender." 1961 Wis. L. Rev. 528, 546.

2. Clark v. State, 62 Wis.2d 194, 205, 214 N.W.2d 450 (1974).

3. State v, Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978); Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978); Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973); State v. Smith, 55 Wis.2d 304, 198 N.W.2d 630 (1972).

4. Verhasselt, cited in note 3, supra, at 664.

5. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

6. See cases cited in note 3, supra.

7. 83 Wis.2d 630, 266 N.W.2d 334 (1978). Under current law, reckless injury under § 940.23 is the equivalent offense to "injury by conduct regardless of life," the offense at issue in Randolph.

8. 83 Wis.2d 647, 266 N.W.2d 342 (1978).

9. 55 Wis.2d 304, 198 N.W.2d 630 (1972).

10. 53 Wis.2d 699, 193 N.W.2d 851 (1972).

11. 54 Wis.2d 213, 194 N.W.2d 660 (1972).

12. 100 Wis.2d 452, 302 N.W.2d 42 (1981).

13. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

14. 143 Wis.2d 624, 422 N.W.2d 160 (Ct. App. 1988).

15. 156 Wis.2d 399, 456 N.W.2d 892 (Ct. App. 1990).

16. 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991).

17. 166 Wis.2d 715, 480 N.W.2d 518 (Ct. App. 1992).

18. See a full critique of the strict test of Randolph in NOTE: Criminal Law – Critique of Wisconsin's Lesser Included Offense Rules 1979 Wis. L. Rev. 896.

19. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

20. 134 Wis.2d 260, 271, citing State v. Hagenkord, 100 Wis.2d 452, 482-83, 302 N.W.2d 421 (1981).

21. Harris v. State, 68 Wis.2d 436, 441, 228 N.W.2d 645 (1975).

22. State v. Randolph, cited in note 3, supra.

23. State v. Eastman, 185 Wis.2d 405, 518 N.W.2d 257 (Ct. App. 1994). The same result was reached under prior law, where cases held that the "conduct evincing a depraved mind" standard failed to meet the test under sub. (3) because the standard was distinct from, and not a species of, recklessness or negligence. See State v. Randolph, cited in note 3, supra; and State v. Weso, 60 Wis.2d 404, 407-410, 210 N.W.2d 442 (1973).

24. Wis. Stat. § 939.23(1).

25. Under the pre-1989 homicide statutes, cases had held that if the charged offense contained the "conduct evincing a depraved mind" standard, subsection (3) does not apply, because that standard does not embody criminal intent. See, for example, State v. Verhasselt, cited in note 3, supra. The same result occurs under current law, where it is clear that first degree reckless offenses are crimes involving "criminal recklessness," which is clearly defined as requiring awareness of the risk, not criminal intent. See § 939.24.

26. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

27. Note that recklessly endangering safety under § 941.30 provides the equivalent to an attempt to commit reckless homicide or reckless injury: the conduct is the same in the sense of creating an unreasonable and substantial risk and the mental state – awareness of the risk – is the same, but death or injury need not be caused; it is sufficient that the safety of another be endangered.

28. State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985).

29. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

30. State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970).

31. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

32. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

33. Weisenbach v. State, 138 Wis. 152, 119 N.W. 843 (1909).

34. State v. Melvin, 49 Wis.2d 246, 253, 181 N.W.2d 490 (1970).

35. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

36. Zenou, 4 Wis.2d 655, 91 N.W.2d 208 (1958). This standard has been cited with approval in many subsequent decisions of the Wisconsin Supreme Court. See, for example, State v. Bergenthal, 47 Wis.2d 668, 178 N.W.2d 16 (1970); State v. Anderson, 51 Wis.2d 557, 560, 187 N.W.2d 335 (1971); Day v. State, 55 Wis.2d 756, 759, 201 N.W.2d 42 (1972); State v. Garcia, 73 Wis.2d 174, 242 N.W.2d 919 (1976).

37. 61 Wis.2d 160, 211 N.W.2d 827 (1973).

38. The defendant in Ross relied on the more liberal rule that applies in at least some federal courts, that the lesser offense should be submitted where there is "any evidence . . . however weak . . . tending to bear upon the issue of the lesser included offense." Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967).

39. State v. Bergenthal, 47 Wis.2d 668, 675, 178 N.W.2d 16 (1970).

40. Garcia v. State, 73 Wis.2d 174, 186, 242 N.W.2d 919 (1976); Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

41. Harris v. State, 68 Wis.2d 436, 228 N.W.2d 645 (1975); Jones (George Michael) v. State, 70 Wis.2d 41, 233 N.W.2d 430 (1975).

42. State v. Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987).

43. State v. Brown, 118 Wis.2d 377, 348 N.W.2d 593 (Ct. App. 1984), reached this conclusion under pre-1989 Wisconsin homicide law with regard to what was then first and second degree murder. The same result would occur under current statutes. But see State v. Holt, 128 Wis.2d 110, 382 N.W.2d 679 (Ct. App. 1985), holding that if there really was not sufficient evidence to support the intoxication instruction, the instruction on the less serious degree of homicide is not required.

44. These sorts of questions were discussed in two decisions of the Wisconsin Supreme Court. See State v. Sarabia, 118 Wis.2d 655, 348 N.W. 2d 527 (1984), and State v. Johnnies, 76 Wis.2d 578, 251 N.W.2d 807 (1977). Also see State v. Simpson, 125 Wis.2d 375, 373 N.W.2d 673 (Ct. App. 1985), on reconsideration of 118 Wis.2d 454, 347 N.W.2d 920 (Ct. App. 1984).

45. State v. Gomaz, 141 Wis.2d 302, 308, 414 N.W.2d 626 (1987); State v. Sarabia, 118 Wis.2d 655, 663, 348 N.W.2d 527 (1984).

46. See Dickey, Schultz, and Fullin, The Importance of Clarity in the Law of Homicide, 1989 Wis. L. Rev. 1323, 1391.

47. 128 Wis.2d 93, 107, 381 N.W.2d 567 (Ct. App. 1985). For other cases applying this evidentiary rule, see State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987), and State v. Simpson, cited in note 44, supra.

48. Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965).

49. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

50. State v. Fleming, 181 Wis.2d 546, 510 N.W.2d 837 (Ct. App. 1993). Indications by the prosecution before and during trial that a lesser included offense instruction would not be requested are not binding in the absence of a formal agreement or stipulation.

51 Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965); Williamson v. State, 31 Wis.2d 677,

143 N.W.2d 486 (1966); Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

52. See, for example, Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978).

53. People v. Wade, 348 P.2d 116 (1959).

54. People v. Sedeno, 518 P.2d 913 (1974); People v. Flannel, 603 P.2d 1 (1979); People v. Wickersham, 650 P.2d 311 (1982).

55. People v. Wade, 348 P.2d 116 (1959).

56. Neunfeldt v. State, 29 Wis.2d 20, 32, 138 N.W.2d 25 (1965). Also see State v. Amundson, 69 Wis.2d 554, 230 N.W.2d 775 (1975), where the giving of an instruction on the defense of entrapment, sua sponte, was upheld even though the defendant objected to the giving of the instruction.

57. See cases cited in note 51, supra.

58. Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). Also see Virgil v. State, 84 Wis.2d 166, 189-90, 267 N.W.2d 852 (1978) for the definition of "plain error" adopted by the Bergeron decision.

59. Wray v. State, 87 Wis.2d 367, 373, 275 N.W.2d 731 (1978); Lambert v. State, 73 Wis.2d 590, 607, 243 N.W.2d 524 (1976).

60. Turner v. State, 64 Wis.2d 45, 218 N.W.2d 502 (1974).

61. Finalizing the instructions at the instruction conference may help to avoid the issue addressed in State v. Thurmond, 2004 WI App 49, 270 Wis.2d 477, 677 N.W.2d 655. Thurmond was tried before a jury on charges of first degree sexual assault, kidnapping, and attempted armed robbery. During deliberations that lasted for two days, the jury forwarded several questions to the judge; the judge reinstructed on reasonable doubt and later gave Wis JI-Criminal 520. After the jurors indicated they had reached agreement on one count, the state requested an additional instruction on second degree sexual assault and attempted "un-armed" robbery. The jury returned verdicts finding the defendant guilty of second degree sexual assault and kidnapping, and not guilty of attempted robbery. The court of appeals reversed the convictions, relying primarily on the likelihood that the jury may have believed that the trial court was recommending the finding of guilt to the lesser included offenses. And, the fact that the verdict came relatively quickly after the additional instructions were given suggests that the jury failed to thoughtfully consider the lesser included offenses. The court did not adopt a per se rule prohibiting giving lesser included offense instructions in this situation and noted it could find little guidance in Wisconsin law on this question.

62. Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

63. In homicide cases in particular, the lesser included offense issue may be almost as important as guilt or innocence. The difference between conviction on first degree intentional homicide (mandatory life imprisonment) and on second degree intentional homicide or reckless homicide is obviously great. It should be a matter of record that the defendant was fully aware of the consequences of not requesting a lesser included offense instruction in a homicide case.

Added support for the suggestion that the trial judge inquire on the record is offered by the decision

of the United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980). Beck reviewed the Alabama procedures for imposing the death penalty which included a statutory prohibition on submitting lesser, noncapital offenses to the jury. The Supreme Court held that the Alabama procedure violated the defendant's right to due process, "by introducing a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." 447 U.S. 625, 643. While Beck is concerned with the death penalty, its reasoning should be equally applicable to noncapital cases, at least to the extent of assuring that the defendant has actively participated in and agreed with the decision not to request the submission of lesser included offenses supported by the evidence.

64. The problems discussed here were acknowledged by the Wisconsin Supreme Court in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983). Felton noted the following statement from Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 202 (1967):

> [T]he battle might be so unequal due to the disparity of the skill of counsel that justice would require, in the unusual case, that such instructions [referring to instructions offered sua sponte] be offered for counsel's consideration.

65. Wisconsin appellate courts have not held that the decision on requesting a lesser included offense instruction is solely for the defendant. Three court of appeals cases have dealt with the issue in the context of claims of ineffective assistance of counsel. In State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988), the defendant sought to establish ineffective assistance of counsel on the ground that defense counsel did not adequately consult with her on the question of requesting an instruction on a lesser included offense. The court rejected the claim but apparently accepted the defendant's argument that the decision on requesting lesser included offense instructions is one for the defendant to make, not defense counsel. Two more recent decisions suggest that the decision is one of trial strategy for defense counsel to make. See State v. Eckert, 203 Wis.2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996): ". . . a defendant does not receive ineffective assistance of counsel where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense." Also see, State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752.

A footnote to the previous version of this special material [c. 1995] cited the commentary to the ABA Standards for Criminal Justice, Standard 4-5.2, (2d ed. 1980), stating that the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. In the current third edition of the standards, the decision on lesser included offenses is not listed as one of those that is for the defendant personally and the comment quoted above has been deleted and replaced with the following: "It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury."

66. Wis JI-Criminal 112 is for cases where there is a single defendant; Wis JI-Criminal 122 is for cases with co-defendants.

67. Wis JI-Criminal 112 (copyright 2000).

68. The court of appeals discussed this issue in State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980). The defendant challenged a transition instruction that told the jury to consider the lesser included offense only if they found the defendant not guilty of the charged crime. The court held that the defendant had waived the right to challenge the instruction, but then went on to say that the instruction

correctly stated the law, citing Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). The Committee reads Dillon as being concerned primarily with the order in which the offenses are considered and as being implicit support for the approach to transition recommended here. See the discussion in note 68, below.

69. In Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), the jury foreman specifically asked the trial court whether the jury had to reach unanimous agreement whether the defendant was guilty or not guilty of the charged crime before considering lesser included offenses. On appeal, the defendant claimed the trial judge's response was such that it told the jury unanimous agreement was required. The supreme court held that the trial judge's complete response would not give the jury that impression, implying that there was merit to the defendant's claim that it would have been error to require unanimous agreement before moving to the lesser included offenses.

In Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909), the instructions were described as telling the jury to consider the lesser included offense upon "its failure to find the defendant guilty of some higher degree of offense." In one view, the failure to agree unanimously on guilt on the charged crime is a "failure to find the defendant guilty."

For a more complete discussion of the Committee's conclusion on this issue, see the Comment to Wis JI-Criminal 112.

70. See State v. Ogden, 35 Or. App. 1, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

71. State v. Muenter, 138 Wis.2d 374, 387, 406 N.W.2d 415 (1987).

72. See State v. Wilson, 149 Wis.2d 878, 440 N.W.2d 534 (1989).

SM-34A DETERMINING SENTENCE CREDIT UNDER SECTION 973.155

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I. Introduction

Wisconsin Stat. § 973.155(1) establishes the basic rule governing sentence credit: An offender is entitled to sentence credit for time he or she spent in custody in connection with the course of conduct for which sentence is imposed. In addition, § 973.155(2) requires a sentencing court to make a specific finding of the number of days for which sentence credit is to be granted to an offender under § 973.155 and to include that finding in the judgment of conviction. The purpose of this Special Material is to assist the court in making a proper determination of sentence credit.

A sentencing court must give credit accorded by the statute because an offender may not serve more time than that for which he is sentenced.[1] Sentence credit has the effect of reducing the amount of time the offender serves in jail or, for bifurcated sentences, in prison under the term of confinement before reaching the date on which he or she is released to the term of extended supervision. That is because, with one exception,[2] when credit is granted an offender's sentence is computed as having begun as many days before the date of sentencing as days credit have been granted. For example, an offender sentenced to 10 years of imprisonment, consisting of five years of confinement and five years of extended supervision, and entitled to six months of credit will be released to extended supervision four years, six months from the date of sentencing.

The basic rule for determining credit is easily stated, but its application can be difficult, particularly in situations in which an offender has multiple cases with different periods of pretrial custody and concurrent or consecutive sentences. To help the sentencing court understand and apply the basic rule, this Special Material proceeds as follows. First, it explains the basic rule governing sentence credit. Next, it discusses procedural and technical aspects of making a credit determination. It then provides a detailed explanation of the basic rule used to determine the number of days for which credit is due. After that explanation, it discusses situations that arise with some regularity, and illustrates, with reference to case law, if available, how to determine credit in those situations. Finally, it provides information about correcting a finding of sentence credit.

II. The Basic Rule

The basic rule for determining sentence credit is set forth in § 973.155(1) and (1m), which read as follows:

> **(1)(a)** A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct

for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;
2. While the offender is being tried; and
3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

(1m) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95 (3), as determined by the department of justice under s. 165.95 (9) and (10), for any offense arising out of the course of conduct that led to the person's placement in that program.

The basic rule, then, is that entitlement to sentence credit depends on the offender having been in custody in connection with the course of conduct for which sentence is imposed.[3] A defendant seeking sentence credit has the burden of demonstrating both custody and its connection with the course of conduct for which the sentence was imposed.[4] Entitlement does not depend on the offender's inability to post bond.

The focus of this Special Material is the determination of sentence credit for days spent in custody up to the date of sentencing, as identified in the three periods of time listed in § 973.155(1)(a).[5] It will also address credit when imposing sentence in sentence withheld – probation ordered cases, which may include time the offender spent in custody while on probation.

III. Procedure for Making the Finding of Sentence Credit in All Cases

A. Tell the parties to be prepared to address sentence credit at sentencing

A great saving of judicial time and energy can be realized if an accurate determination of sentence credit is made at the time the judgment of conviction is entered, when the facts

are fresh, records are available, and the defendant and counsel are present to address the issue. Therefore, the court should require the parties to be prepared to address the sentence credit issue at the time of sentencing. Disputes about the number of days for which credit is due should be anticipated and settled before judgment is entered, by stipulation[6] or, if necessary, further hearing. Accurate information and the informed participation of prosecutor and defense counsel are essential.

B. Make a finding after the proper disposition has been determined

In all cases, the court should first follow its usual procedure to determine the appropriate disposition. After the decision as to type and length of disposition has been made, the finding of the number of days for which sentence credit is due should be made.[7]

C. Make a finding in every case

The finding regarding sentence credit should be made in every case, including those where the disposition is probation or the sentence is to home detention under § 973.03(4).[8] Although § 973.155 does not explicitly require that the sentence credit determination be made in cases where sentence is withheld and probation ordered, making the finding in probation cases will document the finding of credit due up to the date of disposition and make it available if probation is later revoked. (NOTE: The finding on the original judgment will relate only to the credit due as of the date of that judgment; additional credit may also be appropriate at the time of revocation for custody during the revocation process. The consideration of other periods of time in the sentence withheld – probation ordered and revoked case is discussed below, in Section V.B.)

In a case in which the disposition is probation and the court orders jail time as a condition under § 973.09(4), any sentence credit the court grants does not have to be credited against the condition time, although the court has discretion to do so.[9]

D. Make the finding in terms of a number of days

The defendant is entitled to a day of sentence credit for each calendar day during which he or she spent at least part of the day in custody. State v. Johnson, 2018 WI App 2, 379 Wis.2d 684, 906 N.W.2d 704, 2018 WI App 2, ¶8. The only exception to this rule is that the defendant is not entitled to sentence credit for the day on which he or she is sentenced because the Department of Corrections counts that day toward the service of the sentence. State v. Kontny, 2020 WI App 30, ¶¶10-12, 392 Wis. 2d 311, 943 N.W.2d 923. Only the number of days for which credit is due should be determined by the court. That number should be entered on the judgment of conviction. The standard judgment of

conviction form adopted by the Judicial Conference and mandated for use under § 971.025(1) includes a blank for entering a finding of the number of days of credit.

The finding should be in terms of the number of days and should not be expressed as weeks, months, years, or fractions thereof. The sentencing court should not determine the date sentence is to commence. The prison registrar or jail custodian will compute the sentence. As noted in the Introduction, the sentence will be computed as though it had begun as many days before the date of sentencing as days credit have been granted. That is, the sentence of an offender sentenced by the court on May 1, and entitled to 30 days sentence credit, will be computed as though it began on April 1. The date on which the offender is eligible for release will be calculated by the prison registrar or jail custodian as though the sentence had begun April 1.

E. If no credit is due, make that finding

The court should make a specific finding even when it determines that no credit is due. Insert "No" or "0" in the blank provided for the sentence credit finding. This will avoid future questions about whether credit was considered.

F. Apply the credit to the sentence being served

When sentence credit is applied at the time of sentencing, the circuit court should apply sentence credit to the term of incarceration.[10] For instance, if an offender is entitled to credit applicable to charges for which he receives both an imposed sentence and a stayed sentence, the credit must be applied to the imposed sentence.[11]

IV. An Explanation of the Basic Rule

The basic rule established by § 973.155 is that an offender is entitled to sentence credit if the person was (A) in custody and the custody was (B) in connection with (C) the course of conduct for which sentence is imposed. If one of these requirements is not met, the defendant is not entitled to credit.

A. In custody…

"In custody" is not defined in § 973.155, but the Wisconsin Supreme Court has held that "for purposes of sentence credit an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." State v. Magnuson, 2000 WI 19, ¶31, 233 Wis.2d 40, 606 N.W.2d 536.

This means the inquiry into whether an offender was in "custody" begins with the definition of "custody" provided in the escape statute, § 946.42(1)(a)1. In the majority of cases, application of that definition will be sufficient. In some cases, however, the court may also have to consider whether the offender was in a status that subjected him or her to an escape charge for leaving that status.

1. "Custody" based on liability under the escape statute

a. "Custody" as defined in § 946.42(1)(a)1.

Section 946.42(1)(a)1. provides that "custody" includes without limitation the following:

> a. Actual custody of an institution, including a juvenile correctional facility, as defined in s. 938.02 (10p), a secured residential care center for children and youth, as defined in s. 938.02 (15g), a juvenile detention facility, as defined in
> s. 938.02 (10r), a Type 2 residential care center for children and youth, as defined in s. 938.02 (19r), a facility used for the detention of persons detained under
> s. 980.04 (1), a facility specified in s. 980.065, or a juvenile portion of a county jail.[12]
>
> b. Actual custody of a peace officer or institution guard.
>
> bm. Actual custody or authorized physical control of a correctional officer.
>
> c. Actual custody or authorized physical control of a probationer, parolee, or person on extended supervision by the department of corrections.
>
> e. Constructive custody of persons placed on supervised release under ch. 980.
>
> f. Constructive custody of prisoners and juveniles subject to an order under s. 48.366, 938.183, 938.34 (4d), (4h), or (4m), or 938.357 (4) or (5)(e) temporarily outside the institution whether for the purpose of work, school, medical care, a leave granted under s. 303.068, a temporary leave or furlough granted to a juvenile, or otherwise.

g. Custody of the sheriff of the county to which the prisoner was transferred after conviction.

h. Custody of a person subject to a confinement order under s. 973.09(4).

The following situations are within this definition of custody:

- Detention in the county jail before bail is set or thereafter;
- Detention in the county jail during nonworking hours as a condition of bail release or probation;[13]
- Detention in jail in another state when that detention results at least in part from a Wisconsin warrant;[14]
- Time spent in secure juvenile detention pending a waiver to adult court, when jurisdiction is waived and an adult sentence is imposed;[15]
- Time spent at an in-house rehabilitation center when "temporarily outside the [jail] for the purpose of medical care."[16]

b. "Custody" based on unauthorized departure from certain correctional settings

Under Magnuson a person who is in a correctional program that does not constitute "custody" under the definition in § 946.42(1)(a) is still entitled to credit if the statute that creates the correctional program allows for an escape charge for unauthorized departure from the program. Magnuson, 233 Wis.2d 40, ¶¶26-30. In most cases this basis for "custody" will not come into play, as the correctional programs covered by the definition are for offenders who have already been sentenced. Nonetheless, such claims may arise in cases where an offender was in custody on more than one case or charge, so the court and counsel should be aware of the programs that are covered. They include:

- The community residential confinement program under § 301.046;
- The intensive sanctions program under § 301.048;

- Jail labor off the institution grounds under § 302.37(4);
- Home detention under § 302.425;
- Prison labor off the institution grounds under § 303.03;
- Work release plans for prison inmates under § 303.065; and
- County work camps under § 303.10;
- Placement of a juvenile offender in a setting specified under §§ 938.357(4)(a), 938.533(3)(a), 938.538(4)(a), and 938.539(1).

2. Participation in certain AODA programs covered by § 973.155(1m)

Under § 973.155(1m), a person is entitled to credit "for all days spent in custody as part of a substance abuse treatment program that meets the requirements of s. 165.95(3), as determined by the Office of Justice Assistance under s. 165.95(9) and (10) for any offense arising out of the course of conduct that led to the person's placement in that program." The substance abuse treatment programs referred to are those mandated for participants in a qualified "treatment" court.

The Committee concluded that the standard for determining whether the person's status constituted "custody" for purposes of sub. (1m) is the same standard that applies under sub. (1): If the offender was subject to an escape charge for leaving the status, sentence credit should be granted for time spent in that status. Further, § 973.155(1m) is clear that credit for the time the offender was in the treatment program may be applied only to the sentence for the offense being handled in the treatment court.

3. Custody during competency proceeding commitments.

Under Wis. Stat. § 971.14(2)(a), a person committed to a mental health facility for an inpatient competency examination is deemed to be in custody under § 973.155 while he or she is in the facility. Under Wis. Stat. § 971.14(5)(a)3., the days a person spends in a commitment for competency treatment, whether inpatient or outpatient, are also considered days spent in custody under § 973.155.

4. Situations not considered to constitute "custody"

Not included within the definitions of "custody" for sentence credit purposes are the following situations:

- Conditions of release on bond that do not involve spending parts of each day in the county jail;[17]

- Voluntary participation in drug, alcohol, or other treatment programs even though the offender may not be completely free of all restraint on his liberty during such program,[18] unless the program is covered under § 973.155(1m);

- Home detention under a federal consent decree designed to reduce jail overcrowding;[19]

- Time spent on electronic monitoring as a condition of probation.[20]

- Time spent in the community after the person reports to jail but is turned away due to overcrowding or after the person is released early from a period of confinement, even though the person was turned away or released early through no fault of his or her own.[21]

B. …in connection with…

1. Determining whether a connection exists

The requirement that custody be "in connection with" the course of conduct means simply that the custody must be, at least in part, the result of a legal status (arrest, bail, Department of Corrections hold, court order, etc.) stemming from the course of conduct for which sentence is being imposed. If the offender was under restraint for reasons related to the course of conduct, credit is required.[22]

The connection between the custody and the conduct for which sentence is imposed must be a factual connection, not just a "procedural" or "tangential" one.[23] For example, the fact that an offender is sentenced in multiple cases at the same time does not create a connection between custody and the sentences imposed.[24]

Where there are multiple charges an offender's custody may be "in connection with" one charge but not another. Thus, the filing of a detainer against someone already in custody on other charges does not result in "custody" on the charges covered by the detainer.[25] Similarly, an offender is in general not entitled to sentence credit under § 973.155 for custody that is being served in satisfaction of another unrelated criminal sentence.[26]

For example, if an offender serving a sentence for theft is charged with battery to another inmate, his custody is connected only to the theft sentence, not to the battery charge, as long as he is serving that theft sentence.[27]

As another example, assume a person is released on personal recognizance on one charge but later is arrested on a different charge and remains in custody as a result of an inability to post cash bail. When sentenced, the person is entitled to credit only on the sentence for the charge on which he was held in custody. This is true even if the charge on which he was in custody was bail jumping based on a violation of the conditions of the personal recognizance bond in the other case.[28]

2. A connection between custody and a charge may be "severed"

When an offender has multiple charges, a period of custody may initially be connected to all of the charges, but an event relating to one of the charges may "sever" that connection. Once the connection between custody and a particular charge is severed, the offender no longer earns credit toward that charge.

The most common way for a connection between custody and multiple charges to be severed is by sentencing on one of the charges. For instance, assume a person is arrested and held in custody in two separate cases, A and B. If he is sentenced in Case A before he is sentenced in Case B, the sentencing in Case A severs the connection between the custody and Case B, and he is in custody solely for the conviction in Case A. Thus, the person is not entitled to credit toward Case B for any time in custody after being sentenced in Case A.[29]

Another common way for the connection between custody and pending charges to be severed is for the offender to commence serving a previously imposed and stayed sentence after revocation of probation or be returned to prison after revocation of extended supervision. In those situations, relevant statutes provide that the offender commences the previously imposed sentence upon entering the prison system.[30]

C. …the course of conduct for which sentence is being imposed

The use of "course of conduct" rather than a more limited term, such as "offense" or "crime," suggests that credit is to extend to periods of custody that may not have been caused by the specific crime for which sentence is ultimately imposed. Credit is required in at least four situations which raise the "course of conduct" issue:

1. Where several crimes were charged as a result of a single course of conduct, but the offender is convicted of only one crime. Thus, an offender held in custody as a result of charges of theft, burglary, and battery, all resulting from a single incident, must receive sentence credit even if he is convicted of only one of the crimes charged;

2. Where offenses for which the person spent time in custody are "read in" for purposes of sentencing in another case, the offender is entitled to credit for the custody on the read-in offenses, regardless of whether the read-in offenses are factually connected to the course of conduct for which sentence was imposed;[31]

3. Where the offender is convicted of a crime which is a lesser included offense of the crime originally charged. Thus, an offender is entitled to credit if he was arrested for and charged with armed robbery even if he is convicted of the lesser included crime of theft; and

4. Where the offender is held in custody on a probation, parole, or extended supervision hold which is issued due to the course of conduct for which sentence is imposed. (See § 973.155(1)(b).) Credit will be due toward both the sentence for the course of conduct and the sentence in the case in which the hold was issued up to the time the defendant begins serving one of the sentences, unless the sentences are consecutive.[32]

Note, however, that "course of conduct" does not mean "criminal episode." In State v. Tuescher, 226 Wis.2d 465, 595 N.W.2d 443 (Ct. App. 1999), the court held "a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts." Id., 479.[33]

V. Applying the Basic Rule in Common Situations

A. The credit determination to make at the time of original disposition in all cases

The determination to be made at the time of original disposition in all cases is the period of time the offender spent in custody in connection with the course of conduct up to the date of sentencing. The statute identifies three periods of time, namely, those occurring:

1) while the offender is awaiting trial;
2) while the offender is being tried; and
3) while the offender is awaiting imposition of sentence after trial.

B. Imposing sentence after probation has been revoked in a sentence withheld case

1. Determining sentence credit at the time of sentencing after revocation

The basic procedure outlined above should have been followed when the original disposition was ordered in the sentence withheld – probation ordered case. If probation is revoked and an offender is returned to court for imposition of sentence, another sentence credit determination must be made. Three separate periods of time are relevant to the new sentence credit determination:

- Days in custody prior to original disposition – this finding should be the judgment of conviction entered at the time of original disposition;

- Days in custody after original disposition and through the date of probation revocation (for example, conditional jail time, holds, or sanction time) – this finding should be in the revocation order and warrant issued by the department or in the revocation summary provided by the department; and

- Days in custody after revocation, awaiting imposition of sentence – this finding must be made by the sentencing court.

2. "Custody" during the period of probation

Questions may arise about what constitutes "custody in connection with the course of conduct" in the sentence withheld case. These relate primarily to whether certain restrictive situations constitute "custody." It is clear that time spent in jail awaiting revocation should be credited. But restrictions on an offender during the probationary period raise questions:

a. Jail time as a condition of probation

Section 973.155 is not explicit about whether sentence credit is required for time spent in the county jail as a condition of probation. However, the definition of "custody" under the escape statute expressly covers time spent in jail as a condition of probation.[34] That means the offender was in custody while serving that condition time and is therefore entitled to credit for that time toward a sentence imposed after revocation of probation.

b. Time in a treatment facility as a condition of probation

If a probationer spent time in, for example, a drug treatment facility, he or she will be entitled to credit for that time if one of the following applies:

1. The person's status was such that he or she was in "custody" under the standard discussed above in Section IV.A 1, because the offender was subject to an escape charge for leaving the status.

2. The treatment program is covered under § 973.155(1m) as discussed in Section IV.A 2.

C. Sentence credit in multiple sentence situations

Proper determination of sentence credit can be complex in cases where several sentences are involved. The possible situations and relationships are endless.

Problems can be minimized if the court informs itself about the credit applicable to any previously imposed sentence and ensures that each judgment for the sentences it imposes has a finding of sentence credit. This can most easily be achieved by requiring the parties to come to court prepared to discuss and settle the sentence credit issue.

In light of the basic rule discussed above, in Section IV, the Committee recommends the following guiding principles in multiple sentence situations:

- When sentence A is to run concurrently with sentence B, the custody credited to sentence A must be factually connected to the course of conduct for which sentence A is imposed.

- When sentence A is to run consecutively to sentence B, the custody factually connected to sentence A is credited to the sentence only if the custody has not already been credited to sentence B. The aim is to credit the total sentence (consisting of all consecutive sentences put together) with one day for each day spent in custody without duplication of credit for time in custody in connection with more than one of the sentences.

1. Concurrent sentences

When concurrent sentences are imposed for offenses arising from the same course of conduct, sentence credit is to be determined as a total number of days and is to be credited against each sentence imposed. Credit against each sentence is required because credit against only one sentence would be negated by the concurrent sentence. Thus, if the credit was not awarded against both sentences, the offender would not receive the credit to which he is entitled.[35]

However, if concurrent sentences are imposed for offenses that do not arise out of the same course of conduct, the court must determine which sentence any specific period of time in custody should be credited against. As noted above in Section IV.B.2, as a general rule sentencing on one charge severs the connection between the custody and other pending charges. Thus, when custody is in connection with multiple, unrelated charges, credit should be granted on all concurrent sentences imposed for the charges up to the time the defendant begins serving one of the sentences. The amounts may not be equal. Also, the fact that concurrent sentences are imposed at the same time does not serve to transform custody connected to one case into custody connected to another case.[36]

Examples of concurrent sentence situations follow.

a. Multiple counts in a single judgment

Concurrent Sentence Example 1
Smith was arrested for two burglaries, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently with one another.

The judgment of conviction should order that credit is due for 365 days pursuant to § 973.155.

When the judgment reaches the prison, the registrar will credit each of the concurrent sentences with 365 days, thus computing the sentences as though they had begun 365 days earlier.

b. Sentences on unrelated charges for which different amounts of credit are due

Concurrent Sentence Example 2
Johnson is arrested and charged with a burglary and remains in custody for 10 days before posting bail. He is later arrested for a new burglary and remains in custody, unable to post bail. 150 days after his second arrest, he is convicted of both charges and given two years of imprisonment on each count, concurrent.

The judgment of conviction on the first burglary should order that credit is due for 10 days, while the judgment for the second conviction should order 150 days of credit.

This illustrates one of those situations where the periods of time for which credit is due on unrelated concurrent sentences will not line up with each other. Some credit will be due on one sentence and a different amount of credit will be due on another.

In these cases, the registrars shall properly compute the credit ordered against each sentence. Taking the above example, if a defendant is entitled to 10 days of credit on one two-year sentence and 150 days of credit on a concurrent two-year sentence, the registrar will compute each sentence separately and the defendant's controlling sentence will be the two-year sentence with the lesser amount of credit.

c. A sentence imposed to run concurrently with a sentence imposed earlier

In this situation, the determinative questions are the existence of a connection between any of the offender's time in custody and the offense for which sentence is being imposed and, if there is a connection, whether it was ever "severed."

Concurrent Sentence Example 3
Sauk County officials suspected Smith of committing an armed robbery in Sauk County and discover that he is serving a sentence in the Wisconsin State Prison on another charge. Sauk County filed a detainer at the prison. Six months later, Smith is convicted on the Sauk County charge and is sentenced to a term of imprisonment of 10 years, to run concurrently to the sentence he was already serving.

The judgment of conviction in Sauk County should indicate that Smith is entitled to no sentence credit under § 973.155. All the time Smith spent in custody after the filing of the Sauk County charge was spent in service of the previously imposed sentence on an unrelated charge. Thus, there was never a connection between the Sauk County case and Smith's custody, so no additional credit is required.[37]

Concurrent Sentence Example 4
Smith is arrested and charged on the same day in two separate cases, A and B, each arising from a different course of conduct. Unable to post cash bail, he remains in custody. Ninety days after his arrest he is convicted and sentenced in Case A. Sixty days later he is convicted and sentenced in Case B. The sentence is ordered to run concurrently with the sentence in Case A.

The sentencing in Case A severed the connection between Smith's custody and Case B. Thus, his custody after the first 90 days was due solely to the sentence in Case A, and the judgment of conviction in Case B should give credit only for the first 90 days.[38]

Concurrent Sentence Example 5
Smith was convicted of burglary and sentenced to five years of imprisonment, but execution of the sentence was stayed and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the

new charge. He was convicted of the new charge and sentenced to five years of imprisonment, to run concurrently with the sentence underlying the probation, as probation had been revoked at the same time. He spent 180 days in custody.

The judgment of conviction on the new charge should order that credit be granted for 180 days spent in custody. The department's revocation order should also reflect that 180 days credit is due on the sentence underlying the revoked probation.

When the judgment and the revocation order reach the prison, the registrar will credit each sentence with 180 days, by computing each sentence as though it had begun 180 days earlier.

(NOTE: This example assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

Concurrent Sentence Example 6

Smith was convicted of burglary; sentence was withheld and he was placed on probation. He committed another burglary while on probation and was taken into custody. A probation hold was imposed, and bail, which he could not post, was set on the new charge. His probation was revoked and after 180 days in custody he was sentenced after revocation to four years of imprisonment. Ninety days later he was convicted of the new burglary charge and sentenced to four years of imprisonment, to run concurrently with the four-year sentence imposed for the first burglary.

The judgment of conviction on the new burglary charge should order that credit be granted for 180 days spent in custody before being sentenced after revocation for the first burglary. Smith is not entitled to the additional 90 days he was in custody after the sentencing in the first case because that sentencing severed the connection between his custody and the new charge.[39]

While the credit on each judgment will be equal, the second sentence will control Smith's release date because as of the date of sentencing in the second case, he had served 90 more days of the first sentence.

(NOTE: This example also assumes that no credit was due on the sentence underlying the probation for time spent in custody prior to the original sentencing on that charge. If such credit was due, it should be reflected on the original judgment of conviction and in the revocation order and would be credited by the registrar against only the first sentence.)

Concurrent Sentence Example 7

While Smith is on extended supervision he is arrested for a new offense. He is held in custody on an ES hold and on cash bail on the new offense. Three months after his arrest his ES is revoked, and a month after revocation, he is returned to the prison system to commence reconfinement time. Two months after being returned to prison he is convicted and sentenced for the new offense and given a concurrent sentence.

The offender's custody was connected to both the ES case and the new offense until the time he was returned to prison. The return to prison severed the connection between the offender's custody and the new offense. Because the sentence for the new offense is concurrent, however, the offender is entitled to credit toward that sentence for the time between his arrest and his return to prison.[40]

Whether an offender subject to multiple charges or revocations awaits resolution of pending matters in jail or prison, whether cases are resolved at the same time or at wide intervals, or whether one case or the other is first resolved is often fortuitous. Practices differ from county to county, based on local court calendars, whether the offender will waive revocation or plead guilty, and even whether the local detention facility has available space.[41] These practices may result in disparate results in similar cases or may allow "persons to manipulate the system to their advantage" (as by delaying the revocation of probation, parole, or extended supervision).[42] Trial courts should be as fully informed as possible about each case so that unfair results can be avoided. If different judges are involved, it will be unlikely that each judge will be aware of the sentence credit situation in the other case when completing his or her own judgment, but the judge imposing the second sentence should try to become informed of the credit awarded against the first sentence.

d. Concurrent sentences imposed after revocation of probation and revocation of a deferred entry of judgment agreement

Concurrent Sentence Example 8

Smith is arrested and charged with a felony and two misdemeanors arising out of the same course of conduct. He is placed on probation for the misdemeanors and is subject to a deferred entry of judgment agreement on the felony, and is free on bond with respect to the felony. He is later taken into custody and placed on a probation hold, and both probation and the deferred entry of judgment agreement are revoked. After being in custody for 75 days on the hold and while awaiting revocation of probation, he is sentenced after revocation on the misdemeanors and sentenced on the felony. The court imposes concurrent sentences on all three counts.

The judgment of conviction should indicate that Smith is entitled to 75 days of credit on all three sentences even though he was not on probation for the felony because the custody was in connection for the course of conduct for which all three sentences were imposed.[43]

Note that if the felony arose from a course of conduct different from that of the misdemeanors, the custody for any probation hold, or while awaiting probation, revocation would not be connected to the felony unless the bond on the felony was revoked or amended in a way that also kept the person in custody.

2. Consecutive sentences

The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.[44] In situations where consecutive sentences are imposed by different judges, there will have to be some communication between the two courts to assure that sentence credit is properly ordered. This can most easily be achieved by requiring the parties to come to the sentencing hearing prepared to identify any sentence credit awarded on any previously imposed sentences.

Examples of common consecutive sentence situations follow.

a. Multiple counts in a single judgment

Consecutive Sentence Example 1
Smith was arrested for two armed robberies, charged in a two-count information, and convicted of both charges on the same day. He spent one year in jail awaiting disposition. He is sentenced to serve 10 years of imprisonment on each count, the sentences to run consecutively to one another. The judgment of conviction should order that 365 days credit be granted.

If an offender with multiple charges is entitled to credit that is applicable to all of the charges and is given an imposed sentence on one charge and a consecutive imposed and stayed sentence on the others, the credit must be awarded against the first imposed sentence.[45]

b. Sentence to run consecutively to a sentence imposed by another court

Consecutive Sentence Example 2
Smith is arrested for an armed robbery in Dane County. An armed robbery charge is already pending in Sauk County, but Smith had been released on bail. He spends one year in Dane County jail awaiting trial and is then convicted and sentenced to 10 years of imprisonment, with sentence credit ordered for the one year he spent in jail. He pleads guilty to the Sauk County charge and is sentenced to 10 years of imprisonment, to run consecutively to the Dane County charge. Sauk County had lodged a detainer against Smith in Dane County.

The Dane County judgment should order that credit be granted for the 365 days spent in Dane County jail. When the sentencing takes place in Sauk County, the judge must be informed of the sentence and sentence credit ordered in the Dane County judgment. This should be done by the parties, who should come to the Sauk County sentencing prepared to address the sentence credit issue, ideally with a copy of the Dane County judgment.

The Sauk County judge would not order credit for the time spent in custody in Dane County, even though that custody may have been due in part to the Sauk County detainer, because the detainer is insufficient to establish a connection between the Dane County custody and the Sauk County case.[46] When the defendant reaches the institution, his total sentence will be computed as though it had begun 365 days earlier.

(NOTE: There may be other periods of custody allocable solely to the Sauk County case for which credit may be due in the Sauk County judgment.)

c. Multiple sentences with differing amounts of credit

Consecutive Sentence Example 3
Roberts is arrested for a theft and, after remaining in custody for 30 days, is released on bail. He is later arrested for a burglary and remains in custody until he is sentenced in both cases 60 days later. He is sentenced to two years of imprisonment for the theft and six years of imprisonment for the burglary, to run consecutively to the theft sentence.

The judgment of conviction for the theft conviction should include 30 days of sentence credit, while the judgment of conviction for the burglary conviction should order 60 days of sentence credit. Thus, the total consecutive sentences of eight years are reduced by the total of 90 days Roberts spent in custody before sentencing on the two cases.

d. Sentence to run consecutively to a sentence imposed following revocation of probation

Consecutive Sentence Example 4
Smith was convicted of armed robbery in 2010 and placed on probation; sentence was withheld. He was entitled to no sentence credit as a result of that episode. In 2011, he commits another armed robbery. A probation hold is filed against him and he is charged with the new offense. He spends one year in jail awaiting trial and revocation. He is sentenced on the new charge first and receives a 10-year sentence, with credit ordered for the one year. He then comes before the judge who imposed the original probation. A 10-year consecutive sentence is imposed.

The judgment imposed first should order credit for the one year spent in custody. The judge imposing the sentence following revocation of probation must be informed about the sentence and sentence credit ordered in the first judgment and should order no credit for time spent in custody that was awarded as credit on the first judgment.

(NOTE: If Smith had received an imposed and stayed sentence originally, or was on parole or extended supervision, the Department of Corrections would give credit on the stayed sentence or the sentence for which Smith was on parole or extended supervision for all time in custody on the new offense until the person is received at or returned to prison. Thus, in these circumstances, the judge who imposes a consecutive sentence on the new

offense (which was the basis for revoking probation, parole, or extended supervision) should not grant credit for any custody on the new offense.[47])

VI. Correcting Sentence Credit Errors[48]

6. Since the effective date of § 973.155 in 1978, it has been required that the sentence credit determination be made part of the judgment of conviction as a finding by the court. As stressed above in Section III.A., judicial time and energy may be saved if courts require accurate information at the time of sentencing and impress upon the parties the importance of making the credit determination at that time. Even when this is done, however, the credit determination may turn out to be wrong and need correction. Correcting an erroneous credit determination is required even if the defendant stipulated to that determination. State v. Kontny, 2020 WI App 30, 392 Wis.2d 311, ¶¶7-9, 943 N.W.2d 923. See also, State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 968 N.W.2d 93.

If a determination was not made in the judgment, past practice has been to first petition the Department of Corrections for credit. When a determination has been made part of the judgment, any change in that determination requires an amendment of the judgment. While administrative change of the sentence credit finding might be more convenient, a finding in a judgment simply may not be amended by administrative action.

In cases where court action is required to correct a judgment, the correction process can be simple and efficient. A number of different procedural designations could be applied to the request for correction. Regardless of how the request is categorized, it should follow the general format described below.

1. An application to correct the sentence credit determination should be made in the sentencing court.

2. The application should specify the additional credit that is being requested – e.g., to change the sentence credit determination from 50 to 75 days.

3. The application should specify the nature of each separate period of custody for which credit is being claimed – e.g., 10 days in the Wood County jail after arrest and before transfer to Dodge County; 15 days in a mental health facility while competency to stand trial was being evaluated.

4. The application should identify the reason for each period of custody and must show that it was "connected with the course of conduct for which sentence was imposed."

5. Attached to the application should be confirmation by the person having custody of the offender for each period which verifies both the duration and the reason for the custody.

6. A copy of the application should be sent to the district attorney.

7. A hearing is not required but may be ordered in the discretion of the court.

8. If the sentence credit determination is corrected, an amended judgment should be prepared which reflects the proper sentence credit. The amended judgment should be promptly sent to the institution having custody of the offender.

It may happen that an error in the initial determination of sentence credit is not discovered and corrected until after an offender has served the custody portion of the sentence and has been released on parole or extended supervision. The judgment of conviction should still be amended because the additional credit reduces the offender's sentence and, therefore, the amount of time remaining on parole or extended supervision. The amended judgment should be sent to the records office of the Department of Corrections' Division of Community Corrections, which is responsible for supervision of offenders on parole or extended supervision.

The judgment should also be amended even if the error is not discovered and corrected until after the offender's parole or extended supervision has been revoked and the offender reincarcerated under § 302.11(7) or reconfined under § 302.113(9). The additional credit must be applied to reduce the length of reincarceration or reconfinement the offender serves as well as the total length of the remaining sentence.[49]

9. If the application to correct the sentence credit determination is denied, an order to that effect should be entered, and a copy sent to the person who filed the application.

Circuit courts are sometimes asked to address sentence credit requests made by offenders who were sentenced in Wisconsin and later transferred to other jurisdictions—for instance, due to a warrant or detainer. The basic rule described above also applies to these cases: To be granted credit, the offender must have been in custody in connection with the course of conduct for which the Wisconsin sentence was imposed.[50]

That the offender was in custody is typically not disputed in these cases. Instead, the issue is whether that custody was in connection with the Wisconsin case. Because the basic rule of § 973.155 applies, whether an offender sentenced Wisconsin who is made available to another jurisdiction remains in custody in connection with the Wisconsin case will

depend on whether an event in the other jurisdiction severs the connection between custody and the Wisconsin case. The event that will most likely sever the connection will be the imposition of a sentence in the other jurisdiction, though, as in Wisconsin, the nature of the sentence imposed in the other jurisdiction will affect the offender's entitlement to credit.[51]

Determining credit in these situations will therefore require obtaining as much information as possible about not only the amount time the offender was in custody, but also the reasons for the offender's transfer to the other jurisdiction, the nature and disposition of the proceedings in that jurisdiction, when any sentence was imposed, whether the sentence was consecutive or concurrent, and whether credit was given in the other jurisdiction.

COMMENT

SM-34A was originally published in 1982 and revised in 1985, 1988, 1991, 1995, 2013, 2016, 2018, 2019, 2021, and 2023. This revision was approved by the Committee in October 2023; added to the comment.

1. State v. Carter, 2010 WI 77, ¶51, 327 Wis.2d 1, 785 N.W.2d 516 (quoting State v. Ward, 153 Wis.2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989), and State v. Beets, 124 Wis.2d 372, 379, 369 N.W.2d 382 (1985)). Also see, State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

2. The exception is that when a court imposing a life sentence establishes a specific date for parole eligibility under § 973.014(1)(b), time spent in custody prior to sentencing is not credited against that parole eligibility date. State v. Chapman, 175 Wis.2d 231, 499 N.W.2d 222 (Ct. App. 1993). While the court may consider the amount of credit as a factor in setting the eligibility date, the date set by the court governs. State v. Seeley, 212 Wis.2d 75, 83-88, 567 N.W.2d 897 (Ct. App. 1997).

Section 973.014(1)(b) applies only to offenses committed before December 31, 1999, when Truth-in-Sentencing took effect. However, the Truth-in-Sentencing legislation created § 973.014(1g)(a)2., which allows a court imposing a life sentence for an offense committed on or after December 31, 1999, to set a date on which the person is eligible to petition for supervised release under § 302.114(5). No published decision has addressed whether time spent in custody before sentencing should be credited against the extended supervision eligibility date set by a court, but the Committee concludes that under the rationales of Chapman and Seeley the time in custody would not be credited.

3. State v. Obriecht, 2015 WI 66, ¶23, 363 Wis.2d 816, 867 N.W.2d 387.

4. State v. Villalobos, 196 Wis.2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

5. Note that the statute qualifies this listing of three periods of time with the phrase "without limitation by enumeration." Thus, periods of time not listed may be creditable under § 973.155.

6. As noted in Section VI, a defendant's stipulation to a specific amount of credit does not prevent the defendant from seeking additional credit in a subsequent motion. State v. Kontny, 2020 WI App 30, ¶¶7-9, 392 Wis. 2d 311, 943 N.W.2d 923. See also State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 968 N.W.2d 740.

7. In State v. Walker, 117 Wis.2d 579, 345 N.W.2d 413 (1984), the Wisconsin Supreme Court identified the procedure that should be followed: The appropriate sentence is to be determined independently of any time previously served; only then should sentence credit be determined. For a more complete discussion see note 15, SM-34, Sentencing Procedure, Standards, And Special Issues (© 1999).

The awarding of sentence credit is a judicial function that requires a court to reach its own conclusion about the amount of sentence credit to be awarded and to explain its findings and reasoning on the record. While the court may seek assistance from its court clerk in collecting information that may be relevant to the credit determination, the awarding or denial of sentence credit is the duty of the court, not the court clerk. State v. Kitt, 2015 WI App 9, 359 Wis.2d 592, 859 N.W.2d 164.

8. Section 973.03(4)(b) expressly provides for sentence credit for periods of home detention.

9. In State v. Avila, 192 Wis.2d 870, 532 N.W.2d 423 (1995), the Wisconsin Supreme Court rejected the claim that principles of equal protection require that a period of jail time ordered as a condition of probation be reduced to reflect time spent in jail prior to trial because of indigency. The court also rejected the defendant's claim that his condition of probation jail time should be credited for prison time served pursuant to a conviction later reversed. The court held that the applicable statute, § 973.04, applied only to credit against subsequent "sentences" and that jail time as a condition of probation is not a sentence. Avila did not involve a claim that § 973.155 applied, but the same result should follow: that statute also requires credit only against "sentences"; time in jail ordered as a condition of probation is not a "sentence."

10. State v. Obriecht, 2015 WI 66, ¶24, 363 Wis.2d 816, 867 N.W.2d 387.

11. State v. Wolfe, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655. See also § 973.155(3) (computing custody as if it were served time in the institution to which the defendant has been sentenced).

12. State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶¶16-29, 274 Wis.2d 1, 681 N.W.2d 914, held that a person detained or committed under Chapter 980 is not in "custody" for purposes of § 973.155. In 2005 Wis. Act 434, § 45, however, the definition of "custody" under the escape statute was amended to cover detention under Chapter 980. See § 946.42(1)(a)1.a. and 1.e. (referring to facilities under §§ 980.04(1) and 980.065 and to supervised release under Chapter 980). The amendments to § 946.42(1)(a) took effect August 1, 2006. Thus, as of that date, a person detained or committed under Chapter 980 is in "custody" for purposes of § 973.155, effectively superseding Thorson's holding to the contrary. Note, however, that Thorson also held a person's custody under Chapter 980 is not "in connection with" the predicate offense for the commitment; that holding is not changed by the amendments to the definition of "custody" in § 946.42. See note 25, below.

13. Credit is to be granted for time spent in jail as a condition of probation based both on the holding in State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983), and on the fact that 1995 Wis. Act 154 amended the definition of "custody" in § 946.42(1)(a) to include custody in jail as a condition of probation.

As to bail release, note that §§ 969.02(3)(d) and 969.03(1)(e) allow a court to set a condition of bail release that requires a defendant to return to custody after specified hours.

14. Credit should be granted when, for example, a Wisconsin offender is arrested in Illinois on a Wisconsin warrant even if the offender is also being held on Illinois charges, unless or until the offender begins serving a sentence on the Illinois charges. State v. Carter, 2010 WI 77, ¶¶31-40, 58-72, 82, 327 Wis.2d 1, 785 N.W.2d 516. Credit should not be granted when a Wisconsin offender, already in custody on Illinois charges, has a Wisconsin "hold" or detainer filed against him. This is consistent with the conclusion that filing a detainer against one already in custody in Wisconsin does not result in "custody" under § 973.155 on the charge which is the subject of the detainer. See note 27, below.

A prior version of SM-34A (© 1995) stated that a person was in "custody" in another state only if his or her custody was based exclusively on a Wisconsin warrant. This conclusion was rejected in State v. Carter, 2007 WI App 255, ¶¶11-25, 306 Wis.2d 450, 743 N.W.2d 700, aff'd, 2010 WI 77, ¶40, 327 Wis.2d 1, 785 N.W.2d 516, and was removed in the 2014 version of SM-34A.

15. State v. Baker, 179 Wis.2d 655, 508 N.W.2d 40 (Ct. App. 1993).

16. State v. Sevelin, 204 Wis.2d 127, 554 N.W.2d 521 (Ct. App. 1996). Credit is not required where jail time as a condition of probation is stayed and the person is hospitalized for treatment. State v. Edwards, 2003 WI App 221, 267 Wis.2d 491, 671 N.W.2d 371.

17. A person required to remain in his home during all nonworking hours as a condition of bail pending appeal, is not entitled to credit for the period of home detention on the sentence imposed after the appeal was decided. State v. Pettis, 149 Wis.2d 207, 441 N.W.2d 247 (Ct. App. 1989).

18. See the discussion of State v. Cobb, 135 Wis.2d 181, 400 N.W.2d 9 (Ct. App. 1986). In Cobb, the court held that credit was properly denied to a probationer who was ordered, as a condition of probation, to spend either one year in jail or go to a drug abuse treatment center. He chose to participate in a drug treatment program and successfully completed it. When his probation was revoked, he sought credit for the time her spent in the program. The court held that credit was not required because there was no evidence of "custody" – defining that term, by reference to the escape statute, as "physical detention by an institution, institution guard or peace officer." 135 Wis.2d 181, 185. As discussed above in Section IV.A.1 and 2, after Cobb was decided the supreme court clarified that for purposes of sentence credit "custody" is defined not solely by physical detention, but by whether the offender is subject to an escape charge for leaving whatever status or setting her or she was in. Magnuson, 233 Wis.2d 40, ¶31.

19. In State v. Harris, 168 Wis.2d 168, 483 N.W.2d 808 (Ct. App. 1992), the court held that there was no authority to grant credit for time served in a home detention program ordered under the auspices of a federal consent decree.

20. State ex rel. Simpson v. Schwarz, 2002 WI App 7, 250 Wis.2d 214, 640 N.W.2d 527.

21. State v Friedlander, 2019 WI 22, 385 Wis. 2d 612, 923 N.W.2d 849. Friedlander sought credit for time he spent in the community after he was released from a prison sentence when he should instead haven been transferred to a county jail to serve time as a condition of probation in another case. The court of appeals concluded that Friedlander was entitled to credit for the time he was in the community through no fault of his own, citing State v. Riske, 152 Wis. 2d 260, 448 N.W.2d 260 (1989), and State v. Dentici,

2002 WI App 77, 251 Wis. 2d 436, 643 N.W. 2d 180. Riske and Dentici held that a defendant who reported to jail to serve a sentence but was turned away due to overcrowding was entitled to credit for the time he was at liberty. The decisions adopted an equitable doctrine recognized in other jurisdictions that a person erroneously released from custody continues to serve his or her sentence.

The supreme court reversed the court of appeals' grant of credit to Friedlander and overruled Riske and Dentici. The supreme court concluded that Riske and Dentici are inconsistent with the bright-line rule that a person must be subject to an escape charge to be in "custody" for the purposes of § 973.155. Under that rule, it is irrelevant to a sentence credit determination that a person at liberty through no fault of his or her own. Friedlander, 385 Wis. 2d 612, ¶¶24-42.

22. A defendant held "in part" on unsatisfied cash bail on the principal charge and an unrelated charge was in custody in connection with the principal charge up until disposition of the unrelated charge. State v. Harr, 211 Wis.2d 584, 596-97, 568 N.W.2d 307 (Ct. App. 1997). Harr applied State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A) and State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (approving the reasoning in Gavigan).

In some cases a person facing multiple charges arising out of the same course of conduct may be placed on probation for some of the charges and be subject to deferred entry of judgment agreement on other of the charges. If the person is taken into custody on a probation hold, that custody is also considered to be in connection with the charge that is subject to the deferred entry of judgment agreement. State v. Zahurones, 2019 WI App 57, ¶¶13-17, 389 Wis. 2d 69, 934 N.W.2d 905.

See also State v. (Elandis) Johnson, 2009 WI 57, ¶27, 318 Wis.2d 21, 767 N.W.2d 207 (in deciding whether an offender is entitled to credit under § 973.155, the court must determine whether the person was in custody and "whether all or part of the 'custody' for which credit is sought was 'in connection with the course of conduct for which sentence was imposed'"); State v. Hintz, 2007 WI App 113, ¶8, 300 Wis.2d 583, 731 N.W.2d 646 (credit must be awarded under § 973.155(1)(b) for time in custody on an extended supervision hold if the hold was "at least in part" due to the conduct resulting in the new conviction); State v. Thomas, 2021 WI App 59, 399 Wis. 2d 165, 963 N.W.2d 927 (credit must be awarded under Wis. Stat. § 973.155(1)(a) toward a state criminal sentence for time in custody on a federal supervision hold if the hold was due in part to the conduct resulting in the state sentence). Cf. State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999) (offender was in custody in connection with an adult charge while confined under a juvenile commitment because the adult charge led to revocation of juvenile supervision and confinement in juvenile facility).

In State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505, the defendant argued for a broad interpretation of the "in connection with" language in § 973.155 based in part on the statement in the paragraph to which this note is appended that custody "must be, at least in part, the result of a legal status . . . stemming from the course of conduct for which sentence is being imposed." Id., ¶68. The supreme court rejected Johnson's "expansive interpretation" as contrary to applicable case law, in particular State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985), where, once the offender began serving a sentence on one charge, it was irrelevant that he was also awaiting trial on another charge. Id., ¶69. Because SM-34A discusses and incorporates the holdings of the applicable case law, including Beets, the Committee concluded the court's rejection of Johnson's argument did not require a revision of the language of SM-34A.

23. State v. Beiersdorf, 208 Wis.2d 492, 498, 561 N.W.2d 749; (Ct. App. 1997); State v. Floyd, 2000

WI 14, ¶¶15-17, 232 Wis.2d 767, 606 N.W.2d 155; State v. (Elandis) Johnson, 2009 WI 57, ¶33, 318 Wis.2d 21, 767 N.W.2d 207; State v. Harrison, 2020 WI 35, ¶¶36-46, 391 Wis. 2d 161, 942 N.W.2d 310 (holding that the sentences the defendant was serving consecutively to previously imposed sentences in other cases were not factually connected to the course of conduct for which the previous sentences were imposed; thus, when the consecutive sentences were vacated, the defendant was not entitled to have the time in custody on the vacated consecutive sentences credited toward the previously imposed sentences); State v. Lira, 2021 WI 81, ¶¶29-32, 399 Wis. 2d 419, 966 N.W.2d 605 (where an offender previously sentenced in Wisconsin is serving a sentence in another state is returned to Wisconsin to address new, unrelated Wisconsin cases or offenses, his custody here was not factually connected with his Wisconsin sentences and was not entitled to credit on his Wisconsin sentences for time in custody back in Wisconsin). See also State ex rel. Thorson v. Schwarz, 2004 WI 96, ¶34, 274 Wis.2d 1, 681 N.W.2d 914, which held that time spent in the Wisconsin Resource Center pending a Chapter 980 commitment trial is not "in connection with" the sentence on a criminal offense that served as one of the predicates for the Chapter 980 petition.

24. State v. (Elandis) Johnson, 2009 WI 57, 318 Wis.2d 21, 767 N.W.2d 207. See also note 36, below.

25. "Custody" as used in § 973.155 must result "from the occurrence of a legal event, process, or authority which occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." State v. Demars, 119 Wis.2d 19, 26, 349 N.W.2d 708 (Ct. App. 1984) (communication of a detainer which carried no custodial mandate was not sufficient to establish connection with the case in which the detainer was filed); State v. Nyborg, 122 Wis.2d 765, 768, 364 N.W.2d 553 (Ct. App. 1985) (same); State v. Villalobos, 196 Wis.2d 141, 147-48, 537 N.W.2d 139 (Ct. App. 1995) (entry in a jail log indicating an outstanding arrest warrant from another county was not "occurrence of a legal event, process, or authority" sufficient to establish connection between basis for custody and charges for which warrant was issued). Cf. State v. Carter, 2007 WI App 255, ¶¶14-18, 306 Wis.2d 450, 743 N.W.2d 700, aff'd as modified as to number of days of credit granted, 2010 WI 77, ¶¶9, 33-34, 81-82, 327 Wis.2d 1, 785 N.W.2d 516 (arrest of defendant in Illinois on Wisconsin warrant established a connection between custody and Wisconsin course of conduct).

26. State v. Gavigan, 122 Wis.2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984) (citing a prior version of SM-34A). The reasoning in Gavigan was approved by the supreme court in State v. Beets, 124 Wis.2d 372, 380-81, 369 N.W.2d 382 (1985). See also State v. Carter, 2010 WI 77, ¶37, 327 Wis.2d 1, 785 N.W.2d 516 ("once a defendant is actually serving the sentence on a charge, the defendant is not entitled to credit for presentence custody toward sentences on unrelated charges, although trial may be pending on the separate charges at the time the defendant is serving the first sentence."). See also State v. Lira, 2021 WI 81, ¶¶29-32, 399 Wis. 2d 419, 966 N.W.2d 605 (where an offender previously sentenced in Wisconsin is serving a sentence in another state is returned to Wisconsin to address new, unrelated Wisconsin cases or offenses, his custody here was not factually connected with his Wisconsin sentences and was not entitled to credit on his Wisconsin sentences for time in custody back in Wisconsin).

27. An offender's custody may preclude establishment of a connection with a course of conduct even if the custody is not due to service of a criminal sentence. In State v. Riley, 175 Wis.2d 214, 498 N.W.2d 884 (Ct. App. 1993), the defendant escaped from jail confinement ordered as a condition of probation. He was eventually arrested after committing a new crime during the period of escape. He was returned to jail to continue serving the original condition-of-probation confinement and cash bail was set on the new charge, which Riley did not post. At the completion of the condition of probation confinement, Riley was sentenced on the new charge. The court of appeals held that credit for the time spent in jail as a condition of the original probation was not due against the new sentence because § 973.155 "does not authorize credit

for a term of confinement ordered [as a consequence] for prior criminal activity irrespective of whether that confinement is a condition of probation or as the result of a sentence after revocation of probation." Id., 220-21, citing State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985). See also State v. Villalobos, 196 Wis.2d 141, 144-46, 537 N.W.2d 139 (Ct. App. 1995) (applying Riley to similar facts).

Further, a defendant already in custody under a juvenile commitment was not entitled to credit toward an adult battery charge he committed while confined in a juvenile correctional institution based on a previous unrelated delinquency adjudication. State v. (Marcus) Johnson, 2007 WI 107, 304 Wis.2d 318, 735 N.W.2d 505. Because Johnson's juvenile commitment order pre-existed the battery charge, it precluded the creation of a connection between Johnson's custody and the battery charge. Id., ¶63. Nor was a connection created when Johnson's commitment was later extended based in part on the conduct giving rise to the battery charge because, the court concluded, the commitment would have been extended even if the battery had not occurred. Id., ¶71. The court distinguished State v. Thompson, 225 Wis.2d 578, 593 N.W.2d 875 (Ct. App. 1999), [cited above, in note 22,] on the grounds that Thompson's custody was both connected to the new charge, which had been a basis for the revocation of juvenile supervision, and was for treatment in the juvenile system, not continuing punishment of the original offense. Id., ¶¶45-55.

Note, however, that custody under a civil commitment for contempt does not preclude a connection between the custody and a pending criminal charge. Unlike a person serving a sentence, as in Beets, jail time as a condition of probation, as in Riley, or a juvenile commitment, as in (Marcus) Johnson, a person confined under a civil contempt commitment would not necessarily be in custody absent the pending criminal charge because the person may obtain release by meeting the contempt commitment's purge conditions. State v. Trepanier, 2014 WI App 105, ¶¶20-21, 357 Wis.2d 662, 855 N.W.2d 465.

28. In State v. Beiersdorf, 208 Wis.2d 492, 561 N.W.2d 749 (Ct. App. 1997), the defendant posted a personal recognizance bond on a sexual assault charge and remained on that bond until his sentencing. He was, however, held in custody on cash bond on later charges of bail jumping based on violations of the recognizance bond in the sexual assault case. He was sentenced to prison on the sexual assault charge; his sentence on the bail jumping charge was imposed and stayed and he was placed on probation, to run consecutively to the prison sentence for sexual assault. The court of appeals concluded Beiersdorf was in custody only "in connection with" the course of conduct for which sentence was imposed and stayed. Thus, no credit is due on the prison sentence for sexual assault.

29. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984) (discussed in detail in note 34, below); State v. Beets, 124 Wis.2d 372, 369 N.W.2d 382 (1985) (discussed in detail in note 39, below). While sentencing on one charge may be the most common event that will sever the connection, it is not the only one. In State v. Harr, 211 Wis.2d 584, 596, 568 N.W.2d 307 (Ct. App. 1997), the court concluded that the offender's commitment under § 971.17 after being found not guilty by reason of mental disease or defect severed the connection between his custody and an unrelated pending charge.

Not every event that creates an independent basis for legal custody "severs" the connection between an offender's custody and a pending criminal case. To sever the connection, the event must have put the offender in a status that would keep the offender in custody even in the absence of the criminal case. For instance, in State v. Trepanier, 2014 WI App 105, 357 Wis.2d 662, 855 N.W.2d 465, an offender who was already in custody on cash bail in a criminal case was found in contempt for failing to pay a fine in an unrelated case and ordered to be held in custody under the contempt order unless he met the purge condition. The subsequent contempt order did not sever the connection between the custody and the criminal case because, unlike the offender in Beets, who would have been in custody under the sentence imposed even

in the absence of the pending criminal case, Trepanier could have obtained release from the contempt order by satisfying the purge conditions. Id., ¶¶15-21.

In addition, being on bond on a charge that is subject to a deferred entry of judgment agreement does not "sever" the connection between that count and other counts in the case for which the person is placed on probation. State v. Zahurones, 2019 WI App 57, ¶¶18-28, 389 Wis. 2d 69, 934 N.W.2d 905.

30. State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 698 N.W.2d 740 (citing Wis. Stat. § 973.10(2)(b) governing imposed and stayed sentences); State v. Presley, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713, and State v. Davis, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488 (citing Wis. Stat. § 304.072(4) governing persons revoked from parole or extended supervision).

31. State v. Floyd, 2000 WI 14, ¶32, 232 Wis.2d 767, 606 N.W.2d 155. The court in Floyd disclaimed reliance on the "in connection with the course of conduct" language in § 973.155 and instead relied on the phrase "related to an offense for which sentence was imposed," finding the unique nature of read-in offenses made them "related" to offenses for which a defendant is sentenced for purposes of § 973.155(1).

Floyd limits its holding to offenses that are "read in" for sentencing purposes. 232 Wis.2d 767, ¶30. Thus, Floyd does not require credit to be given for custody related to every offense that a judge "considers" at sentencing. See State v. Piggue, 2016 WI App 13, 366 Wis.2d 605, 875 N.W.2d 663. In Piggue, the defendant was in custody on a sexual assault charge when he tried to persuade the victim not to testify against him. He was acquitted of the sexual assault, but was then charged with and convicted of witness intimidation. The judge considered the sexual assault allegations when sentencing Piggue on the intimidation charge, so Piggue argued that Floyd required the time he spent in custody on the sexual assault charges to be credited toward the intimidation sentence. The court of appeals held that Floyd should not be extended beyond its express limitation to "read-in" offenses. 366 Wis.2d 605, ¶¶12-13.

The Supreme Court of Wisconsin reaffirmed Floyd in State v. Fermanich, 2023 WI 48, 407 Wis.2d 693, 991 N.W.2d 340. In Fermanich, the defendant was arrested in Oneida County after stealing three trucks in Langlade County within a span of two hours. Fermanich remained in custody in Oneida County due to his inability to post cash bail, during which time additional charges were filed against him in Langlade County, where he was granted a signature bond. Subsequently, the cases from both counties were consolidated, and Fermanich pleaded guilty to one charge from Langlade County and two from Oneida County, leading to the dismissal of all other charges. Upon violating the terms of his probation, Fermanich was sentenced to 18 months of initial confinement. Applying Floyd, the Supreme Court ruled that Fermanich should receive 433 days of sentence credit for the time he spent in custody related to the Oneida County charges, which were dismissed and read-in, but still considered alongside the Langlade County charge for which the circuit court ultimately sentenced him. Id. at ¶16.

32. As noted above, in Section IV.B.2 of this Special Material, once a person begins serving one of the sentences, his "custody" is no longer "in connection with" the other pending charge. Credit on the sentence for that pending charge will be due only for the days when both charges were pending, prior to the commencement of the other sentence. State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). For cases applying Beets to offenders who are revoked from extended supervision for new charges and given a sentence on the new charges concurrent to the sentence on which supervision was revoked, see State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646; State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2D 713; and State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488. For a case applying Beets to an offender who was on probation with an imposed and stayed sentence and whose

probation was revoked for new charges for which he received a concurrent sentence, see State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 698 N.W.2d 740.This situation is discussed below, Section V.C.1.c, this Special Material. For a discussion of credit in consecutive sentence situations, see below, Section V.C. (intro.) and 2, this Special Material.

33. The defendant in Tuescher won a new trial on an attempted homicide charge arising out of an incident involving a burglary and shooting. The attempted homicide conviction was reversed, and while it was being relitigated he remained in custody serving the sentences imposed for two other charges arising out of the incident. After he was convicted and sentenced again on the attempted homicide, Tuescher sought credit toward the new sentence for his time in custody between winning the new trial and being resentenced. The defendant was not entitled to the credit because during that time he was serving the sentences imposed on the charges which were not retried. 226 Wis.2d 465, 467.

34. See Wis. Stat. § 946.42(1)(a)1.h., and State v. Gilbert, 115 Wis.2d 371, 340 N.W.2d 511 (1983). The question of credit for time spent in jail as a condition of probation was an open one at the time SM-34A was originally published. That version recommended that credit be granted for such time. The Committee's conclusion was adopted in Gilbert, which held that the plain meaning of § 973.155 required that credit be given: "there is no basis for interpreting the statute as excluding custody as a condition of probation from the statute's coverage." 115 Wis.2d 371, 377.

Because jail time as a condition of probation is not a sentence, any "good time" the circuit court allowed the offender to earn while serving the conditional jail time is not eligible for sentence credit under 973.155(4); that statute provides for sentence credit to include "good time" only for sentences of one year or less. State ex rel Baade v. Hayes, 2015 WI App 71, 365 Wis.2d 174, 870 N.W.2d 478.

35. This principle was cited with approval and applied in State v. Ward, 153 Wis.2d 743, 452 N.W.2d 158 (Ct. App. 1989).

36. State v. (Elandis) Johnson , 2009 WI 57, ¶¶50-60, 318 Wis.2d 21, 767 N.W.2d 207, criticized a prior version of SM-34A (© 1995) that referred to crediting equally all concurrent sentences "imposed at the same time or for offenses arising from the same course of conduct." The court found this formulation "unfortunate" because it was "too broad" and had led to the belief that when concurrent sentences are imposed at the same time, any credit is to be applied against each of the sentences imposed regardless of whether the custody was factually connected to each sentence. Noting that the "unfortunate" passage was more understandable, if still inaccurate, when read in context with the examples in the Special Material, the court made it clear that any custody applied to any given sentence must also be factually connected to that sentence. Id., ¶¶61-68. As applied to Johnson's case, the court held:

> ¶47 Calculating the correct number of days that need to be credited to each of Johnson's concurrent sentences requires that we examine separately each sentence and the time spent in presentence custody "in connection with" each sentence. We cannot, as Johnson's argument attempts to do, conflate all the concurrent sentences imposed on the same day and make a credit determination as if there were only one overall sentence imposed.

The language criticized in (Elandis) Johnson was removed in the 2014 version of SM-34A.

37. When credit has been granted against an earlier sentence which was completely served before sentencing on a new offense, no credit against the new sentence is required. State v. Morrick, 147 Wis.2d

185, 432 N.W.2d 654 (Ct. App. 1988); State v. Amos, 153 Wis.2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989); State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338.

See also State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (defendant not entitled to credit for time served in California while he was on Wisconsin parole because he had received full credit for the time toward the sentence he completed in California); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution); State v. Coles, 208 Wis.2d 328, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to a "time served" sentence that used all his pretrial credit was not entitled to any of that credit toward a sentence on a second count because the sentence on the second count was effectively consecutive).

38. State v. Gavigan, 122 Wis.2d 389, 362 N.W.2d 162 (Ct. App. 1984). Gavigan committed a robbery on September 15, 1982. About 24 hours later, he led police on a high speed chase that resulted in a charge of fleeing an officer. Thirty-nine days after his arrest, he pleaded guilty to the fleeing charge and was sentenced to six months in jail. One hundred and seven days later Gavigan was sentenced on the robbery – a three-year sentence to run concurrently with the six-month sentence on the misdemeanor. The trial judge gave 39 days credit on the three-year sentence.

Gavigan claimed he should also receive credit for the 107 days that followed the misdemeanor sentence but preceded the robbery sentence. The court of appeals affirmed the denial of credit for the 107 days, holding that the custody was not "in connection with" the robbery charge – it was attributable solely to the misdemeanor conviction.

39. See State v. Beets, 124 Wis.2d 372, 369 N.W.2d 352 (1985). Beets was convicted of drug offenses and placed on probation with sentence withheld. He was arrested on a burglary charge and held in custody for that charge. Within a few days, a probation hold was added. The hold was based on the burglary charge.

Seventy-eight days after his arrest, Beets' probation was revoked and two concurrent three-year sentences were imposed. He received credit for the 78 days and went to prison.

One hundred and ninety-two days after his prison sentence began, Beets was sentenced on the burglary. He received a three-year sentence concurrent with the sentence he was already serving. He received 78 days credit for the time spent in custody before the first sentence was imposed (when both the revocation and the burglary charge were pending).

Beets sought credit for the 192 days that elapsed after his first prison sentence began, while the burglary charge was pending.

The supreme court affirmed the trial court's denial of credit, holding that confinement after the first sentence was imposed could not be "in connection with" the pending burglary charge. Thus, § 973.155 does not require credit, because the charges resulting in the first sentence and the pending charges were not "related." The court stated that "unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges." Id., 383.

The rule in Beets that sentencing on a related charge "severs the connection" was applied in State v.

Abbott, 207 Wis.2d 624, 558 N.W.2d 927 (Ct. App. 1996). Abbott committed a battery while serving a sentence under the Division of Intensive Sanctions (DIS) program. He received a sanction of 89 days in jail. Later, he pled guilty to the battery and was sentenced. The court of appeals held Abbott was not entitled to credit on the battery sentence for time spent in jail for the DIS sanction. Any connection between the two sentences was severed when Abbott began serving the DIS sanction. See also State v. Hintz, 2007 WI App 113, ¶7 n.3, 300 Wis.2d 583, 731 N.W.2d 646 (applying Beets to offender revoked from extended supervision for new charges and given a sentence on new charges concurrent to sentence on which supervision was revoked).

However, Beets does not mean every sentencing "severs" the connection between custody and charges unrelated to the one on which the sentence is imposed. In State v. Yanick, 2007 WI App 30, 299 Wis.2d 456, 728 N.W.2d 365, the defendant was serving six months of confinement as a condition of probation for an OWI offense. While serving that condition time he was sentenced in an unrelated case. That sentence began running while he was serving condition time and was longer than the condition time.

When his probation on the OWI was revoked, he was entitled to credit toward the revocation sentence for the condition time despite the fact much of that time was concurrent to the sentence in the unrelated case:

> ¶22 To the extent the State is suggesting that Beets holds that service of a sentence on crime A always "severs" time in custody owing to crime B for purposes of awarding sentence credit on the sentence for crime B, we disagree. Beets addressed a particular type of status--time in custody serving a sentence and awaiting disposition on a separate crime. Beets does not address service of a sentence and concurrent service of custody time pursuant to a disposition, which is the sort of concurrent custody time at issue here.

Because Yanick was ultimately sentenced for the OWI for which he was confined as a condition of probation, his custody was factually connected to the course of conduct for which sentence was imposed. See also State v. (Elandis) Johnson, 2009 WI 57, ¶¶42-44, 318 Wis.2d 21, 767 N.W.2d 207 (discussing Yanick).

If an offender is in custody on a federal supervision hold based on state criminal charges and later receives a sentence for the state charges that is concurrent to the federal sentence, the offender is entitled to credit toward the state sentence for time spent in custody until the imposition of sentence in the federal case, which severed the connection between custody and the state charges. State v. Thomas, 2021 WI App 59, 399 Wis. 2d 165, 963 N.W.2d 927.

40. State v. Hintz, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646. Hintz asked only for confinement up to his reconfinement hearing, which for purposes of § 973.155 is essentially a sentencing hearing. See State v. Presley, 2006 WI App 82, 292 Wis.2d 734, 715 N.W.2d 713. Courts no longer determine the amount of reconfinement after revocation of extended supervision, so the reconfinement hearing is not the point at which the offender's sentence begins running again; instead the sentence resumes running when the person is returned to prison. Wis. Stat. § 304.072(4). State v. Davis, 2017 WI App 55, 377 Wis.2d 678, 901 N.W.2d 488.

41. Depending on the situations, sentences begin to run or resume running at different times.

a) Sentences to confinement commence on the date of imposition. Wis. Stat. § 973.15(1). This

provision covers situations in which sentence was originally withheld and probation imposed.

b) Following revocation of probation in the imposed-and-stayed-sentence-probation-imposed case, the sentence commences when the offender arrives at the prison. The revocation date is irrelevant. Wis. Stat. § 973.10(2)(b). See also State v. Slater, 2021 WI App 88, 400 Wis. 2d 93, 968 N.W.2d 740.

c) Sentences of revoked parolees or persons on extended supervision resume running on the date the person is received at the correctional institution. Wis. Stat. § 304.072(4). See also State v. Presley, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713; State v. Davis, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488.

42. State v. Beets, 124 Wis.2d 372, 383, 369 N.W.2d 382 (1985).

43. State v. Zahurones, 2019 WI App 57, 389 Wis. 2d 69, 934 N.W.2d 905.

44. The Wisconsin Supreme Court approved of this general principle in State v. Boettcher, 144 Wis.2d 86, 423 N.W.2d 533 (1988), reversing 138 Wis.2d 292, 405 N.W.2d 767 (Ct. App. 1987). The essential dates and facts were as follows:

4/12/86	Boettcher, on probation with a three year stayed sentence, is arrested for a new offense; a probation hold is imposed.
4/22/86	Initial appearance on new charge; signature bond on new charge; probation hold remains in effect so Boettcher remains in custody.
7/23/86	Probation is revoked and the three year stayed sentence takes effect – on that sentence, credit for all days in custody from 4/12 through 7/23 (110 days) is awarded; sentence is imposed on new offense – 1 year to run consecutively to the other sentence – and no credit for time in custody is given.

The court of appeals held that additional credit should have been given on the sentence for the new crime for the 10 days between 4/12 and 4/22 – the time after arrest and before he was "released" on a signature bond for the new offense. (Of course, he was not released; he remained in custody on the probation hold.) The court reasoned that he was "in custody" on the new offense for this period and credit must be given against the eventual sentence on that offense. This is the case even though he received credit for that 10-day period on the other sentence resulting from the revoked probation.

The supreme court reversed the court of appeals, concluding "that dual credit is not permitted – that the time in custody is to be credited to the sentence first imposed – and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Stats. Credit is to be given on a day for day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." 144 Wis.2d 86, 87.

This holding is consistent with SM-34A, which the court cited with approval:

> We agree with, and endorse, the position of the Wisconsin Criminal Jury Instructions Committee's language in SM-34A V.B., where, in discussing consecutive sentences, it

concludes:

> "The objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences." 144 Wis.2d 86, 101.

The Boettcher rule also applies where a sentence has already been served: "The core idea of Boettcher is that 'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." State v. Jackson, 2000 WI App 41, ¶19, 233 Wis.2d 231, 607 N.W.2d 338. See also State v. Coles, 208 Wis.2d 328, 334, 559 N.W.2d 599 (Ct. App. 1997) (a defendant who was sentenced on one count to "time served" in an amount equal to his pretrial credit was not entitled to any credit on the prison sentence imposed for a second count; the prison sentence was consecutive to the "time served" sentence because the "time served" sentence was completed upon pronouncement of sentence); State v. Rohl, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991) (applying Boettcher to deny defendant credit for time served in California while he was on Wisconsin parole before his Wisconsin parole was revoked; because his parole was not revoked until after he was released in California and returned to Wisconsin, his post-revocation Wisconsin sentence was consecutive, not concurrent, to the California sentence); State v. Martinez, 2007 WI App 225, 305 Wis.2d 753, 741 N.W.2d 280 (reaching the same conclusion with respect to time served in a federal institution before the person's Wisconsin parole was revoked).

Further, the Boettcher rule applies when one of several concurrent sentences is vacated and, after resentencing, is ordered to run consecutively to the previously imposed sentences with which it was originally running concurrent. State v. Lamar, 2011 WI 50, ¶¶35-37, 334 Wis.2d 536, 799 N.W.2d 758. Lamar was serving two concurrent sentences. He successfully challenged his conviction, but by the time he did so one of the sentences was finished. After he was reconvicted, the court imposed a new sentence, ordered it to run consecutively to any other sentence, and denied Lamar credit for the time he had served on the sentence that discharged before his conviction was vacated. The supreme court affirmed, holding "the time for which Lamar seeks credit was served on a separate, non-concurrent sentence. If Lamar received the sentence credit he seeks, he would receive dual credit from two consecutive sentences [for the same period of time]. As this court held in Boettcher, defendants are not entitled to receive this dual credit on a consecutive sentence." 334 Wis.2d 536, ¶37 (citing a previous version of this Special Material). The court also concluded that § 973.04 – which requires credit for confinement previously served when a sentence is vacated and a new sentence imposed – was not inconsistent with application of Boettcher and that denial of the credit did not violate the prohibition against double jeopardy. 334 Wis.2d 536, ¶¶35, 43-50.

Finally, the Boettcher rule applies to cases in which an offender is seeking credit against consecutive sentences for a period of pretrial custody in two separate cases. State v. Trepanier, 2014 WI App 105, ¶14, 357 Wis.2d 662, 855 N.W.2d 465. Trepanier was in custody in both a pending criminal case and a civil commitment for contempt. When he was sentenced in the criminal case the judge ordered the sentence to run consecutively to the civil commitment. Boettcher did not preclude awarding credit for the time Trepanier was in both pretrial custody for the criminal case and custody under the civil commitment because the custody for the civil commitment was not pretrial custody. Id., ¶¶12-14.

45. State v. Wolfe, 2001 WI App 66, 242 Wis.2d 426, 625 N.W.2d 655.

46. See note 25, above.

47. Note, however, that if supervision has not yet been revoked, ordering the credit for the new offense may be required. In State v. (Eliseo) Brown, 2010 WI App 43, 324 Wis.2d 236, 781 N.W.2d 244, the defendant was held in custody in connection with a Wisconsin case and an Illinois parole hold. He was sentenced in Wisconsin first, and given a sentence consecutive to any other sentence. The circuit court denied him credit for his custody time on the theory Illinois might grant it to him, and thus give him improper "double credit." The court of appeals held it must be applied to the Wisconsin sentence, as the question of "double credit" was not ripe because Illinois had not revoked his parole yet, and to deny credit on this sentence might mean he would never get it at all.

48. This section discusses the modification or correction of a sentence to reflect sentence credit where none, or an allegedly inadequate amount, had originally been given. See State v. Amos, 153 Wis.2d 257, 279-82, 450 N.W.2d 503 (Ct. App. 1989), for a case where a sentence was amended to eliminate sentence credit to which the defendant was not entitled.

49. State v. Obriecht, 2015 WI 66, ¶¶33-36, 42-47, 363 Wis.2d 816, 867 N.W.2d 387. Obriecht addressed the application of credit to an offender reincarcerated under § 302.11(7), which governs parole revocation, but § 302.113(9), which governs extended supervision revocation, is essentially identical to § 302.11(7). Thus, the Committee concludes Obriecht's holding will also apply to offenders who have been reconfined under § 302.113(9).

50. State v. Lira, 2021 WI 81, ¶35, 399 Wis. 2d 419, 966 N.W.2d 605 (when a "convicted offender" is "made available to another jurisdiction," sentence credit toward the offender's Wisconsin sentence must conform to "the terms of s. 973.155).

51. For example, if the offender is serving a Wisconsin sentence and the other jurisdiction imposes a concurrent sentence, the Wisconsin sentence would continue to run—just as would be the case if the offender serving a sentence imposed in one county in Wisconsin was given a new, concurrent sentence in another Wisconsin county. If the other jurisdiction imposes a consecutive sentence, that would sever the connection between the offender's custody and the Wisconsin case until the offender is returned to Wisconsin to complete the sentence imposed here. Cf. Lira, 399 Wis. 2d 419, ¶¶33. It might also be the case that the offender's custody in the other jurisdiction before being sentencing there should be credited to the Wisconsin sentence because the offender was not given any credit for that time toward the sentence in the other jurisdiction.

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SM-35 INCREASED PENALTY FOR HABITUAL CRIMINALITY — § 939.62

CONTENTS

Scope

This Special Material addresses issues arising in implementing Wisconsin's "repeater" statute – § 939.62. The formal title for the provision is "increased penalty for habitual criminality," but the commonly used term "repeater" is employed here. This addresses the generally applicable repeater provisions set forth in subsections (1), (2), and (3) of § 939.62.[1] Not addressed is the "persistent repeater" provision in § 939.62(2m)[2] or the several crime-specific repeater provisions that now exist.[3]

Issues arise at several stages of the criminal prosecution: when repeater status is alleged in the charging document; when a plea of guilty is accepted; when proof of repeater status is made; when the trial court makes the formal finding of repeater status; and when the repeater-enhanced sentence is imposed. There are also substantive issues concerning the timing of offenses and convictions, how the repeater statute's time periods are affected by periods of incarceration, and how the repeater statute is applied to specific statutory violations.

I. Alleging Repeater Status

A. Before Arraignment or Plea

If the State seeks to establish that a defendant is a repeat offender and thus eligible for an enhanced sentence, it must allege the defendant's prior convictions "in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea." § 973.12(1).

The Wisconsin Supreme Court has recognized that the time of arraignment or plea acceptance is "the cut-off point after which time a defendant can no longer face exposure to repeater enhancement for the crime" charged. State v. Martin, 162 Wis.2d 883, 900, 470 N.W.2d 900 (1991). This cut-off point is strict and applies regardless of the type of plea entered by the defendant. When a repeater allegation is improperly added after the deadline, it is of no effect and must be vacated. Proof of prejudice is irrelevant. Finally, the portion of § 973.12(1) which allows for time to investigate the defendant's possible prior convictions before a plea is accepted does not extend the period for alleging repeater status beyond the time of arraignment or plea acceptance or entry. Martin, 162 Wis.2d 883, 906.

B. Amending a Repeater Allegation

A charging document may be amended after arraignment or plea acceptance to correct

an error in the portion dealing with repeater status if the amendment does not prejudice the defendant. In State v. Gerard, 189 Wis.2d 505, 509, 525 N.W.2d 718 (1994), the court allowed the correction of the portion of the information which dealt with the extent of the penalty because that portion was not required by § 973.12(1) and because the amendment did not prejudice the defendant. An amendment of this type is not prohibited by § 973.12(1) because the allegation of a defendant's prior convictions will still have been made prior to arraignment and plea acceptance. Therefore, the amendment will be allowed unless there is prejudice to the defendant.

Applying Martin and Gerard, the Wisconsin Court of Appeals has held that "where the information correctly alleges a defendant's repeater status, a post-arraignment amendment to the information does not violate § 973.12 as long as it does not affect the sufficiency of the notice to the defendant concerning his or her repeater status." State v. Campbell, 201 Wis.2d 777, 785, 549 N.W.2d 501 (Ct. App. 1996).

A post-arraignment or post-plea amendment to the charging document alleging a provable prior conviction after the State failed to prove the prior conviction included in the original charging document will not be allowed. An amendment of that sort violates due process because the defendant has not been sufficiently notified of possible punishment at the time of arraignment or plea. State v. Wilks, 165 Wis.2d 102, 110, 477 Wis.2d 632 (Ct. App. 1991).

C. Dismissal and Refiling

When a repeater allegation has not been timely filed, or if there is an error in the allegation, the State may move for dismissal of the complaint without prejudice and, if the motion is granted, issue a new complaint that includes a proper repeater allegation. State v. Larsen, 177 Wis.2d 835, 839-40, 503 N.W.2d 359 (Ct. App. 1993).

II. Methods of Establishing Repeater Status; When it Must be Established

Before sentencing a defendant to the enhanced periods set forth in § 939.62, the prior convictions serving as a basis for the penalty increase must be "admitted by the defendant or proved by the State." Wis. Stat. § 973.12. As elaborated by the case law discussed below, this statute provides that the prior convictions can be established in either of the two ways:

(a) by the defendant's **personal** admission of the priors; or (b) by proof of the priors by reference to an official record, preferably by furnishing the court with copies of the judgment of conviction.

A. By the Defendant's Personal Admission

An admission of the prior convictions by the defendant is the simplest, surest way to establish the existence of the convictions. The admission must be made by the defendant personally, on the record. An admission may not "be inferred nor made by a defendant's attorney, but rather, must be a direct and specific admission by the defendant." State v. Koeppen, 195 Wis.2d 117, 127, 536 N.W.2d 386 (Ct. App. 1995) (Koeppen I), citing State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984). The admission must contain specific reference to the date of the conviction and any period of incarceration, if relevant to application of § 939.62 (see below, Sec. III. A and C). State v. Saunders, 2002 WI 107, ¶22, 255 Wis.2d 589, 649 N.W.2d 263.

In guilty plea cases, it is sufficient to cover this step with a specific question during the plea acceptance colloquy. SM 32, Accepting A Plea Of Guilty, includes the following question:

"Were you convicted of (name of offense) on (date)?"

Adding a question like this was suggested by the court of appeals in State v. Goldstein, 182 Wis.2d 251, 261, 513 N.W.2d 631 (Ct. App. 1994):

> One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial:

> The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . .

Farr, 119 Wis.2d at 659.

The question in SM-32 is modeled after the one suggested in Farr.

B. By Copy of the Judgment of Conviction or Other Official Record

If the defendant does not provide a direct personal admission of the prior conviction, then the State must prove the existence and date of the conviction beyond a reasonable doubt. Saunders, 255 Wis. 2d 589, ¶¶20, 51.

The best, most direct method of proving prior convictions is to provide a certified copy of the judgment(s) of conviction. Saunders, 255 Wis. 2d 589, ¶¶24, 55. An uncertified copy may also suffice. Id., ¶¶25-31, 34. Other documents may also be used. Section 973.12(1) provides in part as follows:

> An official report of the F.B.I. or any other governmental agency of the United States or of this or any other state shall be prima facie evidence of any conviction or sentence therein reported.

Any official report specific enough to identify the defendant, the crimes, and the date of the convictions is sufficient. See Farr, 119 Wis.2d at 660. A presentence report qualifies if the repeater allegation was expressly contemplated by the writer of the report; the date of the relevant prior conviction is included in the report; and the report contains sufficient indications that the writer independently verified the prior conviction from sources other than the complaint. State v. Caldwell, 154 Wis.2d 683, 693–95, 454 N.W.2d 13 (Ct. App. 1990).

Section 939.62(3)(a) excludes motor vehicle offenses under chs. 341 to 349 as qualifying prior convictions for § 939.62 sentencing enhancement. However, if a defendant has previously been convicted of a criminal offense involving a motor vehicle—for instance, under §§ 940.09 and 940.10—that conviction will be listed on the defendant's Department of Transportation driving transcript. A certified DOT transcript is sufficient to prove prior convictions for purposes of sentence enhancement under the traffic code. State v. Spaeth, 206 Wis.2d 135, 153, 556 N.W.2d 728 (1996). The standard for establishing prior convictions for sentence enhancement in traffic cases is lower than under § 939.62, Saunders, 255 Wis. 2d 589, ¶¶32-33, and there is no case addressing the use of a DOT transcript to prove a prior conviction for purposes of § 939.62. Nonetheless, the Committee concludes that the standards for assessing the sufficiency of a presentence report or other official report under § 973.12 would apply to the use of a DOT transcript if it is offered as proof of a prior conviction for purposes of § 939.62.

By contrast, Consolidated Court Automation Programs (CCAP) reports are not sufficient to establish prima facie proof of a qualifying conviction for purposes of sentencing a defendant as a repeater. State v. Bonds, 2006 WI 83, ¶42, 292 Wis.2d 344,

717 N.W.2d 133 (a CCAP report is neither the official record of a criminal case nor a copy of the actual judgment of conviction).

Note that once a defendant has been found guilty of an alleged qualifying conviction, whether upon entry of a plea or return of verdict, the defendant has been "convicted" for purposes of § 939.62 even if he or she has not yet been sentenced. State v. Wimmer, 152 Wis. 2d 654, 449 N.W.2d 621 (Ct. App. 1989). In the event a judgment of conviction has not yet been entered for the alleged qualifying offense because the defendant has not yet been sentenced, proof of existence of conviction will require some other kind of court record—for instance, a transcript of the plea, a copy of the verdict forms, or minute sheets.

Proof of the prior conviction is not governed by the formal rules of evidence applicable at trial. Saunders, 255 Wis.2d 589, ¶¶36-46; Wis. Stat. § 911.01(4)(c). The state may satisfy the proof requirement by asking the court to take judicial notice of court records in the same county and supplying the necessary information. Wis. Stat. § 902.01(2)(b) and (4); State v. Koeppen, 2000 WI App 121, ¶¶35-37, 237 Wis. 2d 481, 614 N.W.2d 530 (Koeppen II). Regardless of the evidence submitted to prove the qualifying conviction, if the defendant objects to its accuracy or reliability the State may need to submit supplemental proof to establish beyond a reasonable doubt the existence of the conviction. The court must look at and weigh the totality of the evidence to determine if the State has satisfied its burden. Saunders, 255 Wis.2d 589, ¶¶52-53.

Finally, the existence of the prior convictions must be established **before** sentence is actually imposed. If the defendant did not personally admit the convictions at the time of the plea or went to trial, the court may ask for an admission at the sentencing hearing. Koeppen I, 195 Wis.2d at 130; Goldstein, 182 Wis.2d at 261. If the defendant has not admitted the convictions, the State may rely on proof that was submitted as evidence or otherwise entered in the record either before or at sentencing. Saunders, 255 Wis.2d 589, ¶48; State v. Kashney, 2008 WI App 164, 314 Wis.2d 623, 761 N.W.2d 762. However, if the State relies on the use of judicial notice, it must do so prior to sentencing despite § 902.01(6), which provides that judicial notice may ordinarily be taken at any stage of the proceeding. Koeppen I, 195 Wis.2d at 131 (the use of judicial notice at a postconviction proceeding to correct the failure to prove prior convictions at sentencing is not effective because it is too late).

III. Substantive Issues

A. Timing of Offenses and Convictions

A defendant will be eligible for enhanced punishment as a repeat offender "if the actor

was convicted of a felony during the 5 year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. . . ." § 939.62(2); State v. Midell, 40 Wis.2d 516, 527, 162 N.W.2d 54 (1968); Goldstein, 182 Wis.2d at 259. The date the judgment or judgments of conviction were entered determine the date for measuring the 5 year period. State v. Mikrut, 212 Wis.2d 859, 569 N.W.2d 765 (Ct. App. 1997).

B. Misdemeanor Convictions

The phrase "convicted of a misdemeanor on three separate occasions," as used in § 939.62(2), does not require that three misdemeanor convictions occur in three separate court appearances. State v. Wittrock, 119 Wis.2d 664, 674, 350 N.W.2d 647 (1984). The focus is on the quantity of crimes committed and not the date of each conviction. "Whenever a misdemeanant is convicted of a fourth misdemeanor which was committed subsequent to the convictions of three prior misdemeanors, the defendant's sentence may be enhanced by the repeater statute." Id.

Because the focus is on the quantity of misdemeanors committed, a defendant's sentence may be enhanced even if the three misdemeanors serving as the basis for repeater status were committed as part of a single incident or transaction. State v. Hopkins, 168 Wis.2d 802, 810, 484 N.W.2d 549 (1992). "[T]hree convictions of misdemeanors during the five-year period satisfies the statute, regardless of when the misdemeanors were committed." Id.

In the Committee's judgment, a misdemeanor conviction expunged under § 973.015 cannot be the basis for a repeater finding. Section 939.62(2) requires that "convictions remain of record and unreversed"; an expunged conviction does not "remain of record."[4]

C. Periods of Incarceration

When a court calculates the 5 year period between the commission of the present offense and the conviction of any prior offenses, "time which the actor spent in actual confinement serving a criminal sentence shall be excluded." § 939.62(2).

The charging document need not include the period of incarceration served by the defendant even if the period between the commission of the present crime and the defendant's prior conviction(s) is greater than 5 years. State v. Squires, 211 Wis.2d 873, 879, 565 N.W.2d 309 (Ct. App. 1997).

Where the period between the commission of the present crime and the conviction for any prior crimes exceeds five years and the defendant had been imprisoned during that period, the length of the period of confinement must either be admitted by the defendant or proved by the State. State v. Goldstein, 182 Wis.2d at 260 (the defendant's admission that he spent "10 months, about" in prison was inadequate to satisfy the proof of the element).

The Wisconsin Court of Appeals has suggested the use of the following question to obtain an adequate admission from the defendant: "For what period of time was the defendant incarcerated as a result of the conviction?" Zimmerman, 185 Wis.2d at 559.

If an adequate admission cannot be obtained from the defendant, the State must prove the period of incarceration in the same way it is required to prove the defendant's prior convictions. Goldstein, 182 Wis.2d at 260 61.

IV. Sentencing

Section 939.62 applies only where the court wishes to impose a sentence beyond the statutory maximum for the crime of which the defendant was convicted. So, even if repeater status was properly alleged and proved, the penalty increases come into play only if the sentencing judge imposes a sentence in excess of the regular maximum for the crime. If the court imposes a sentence within the regular statutory range, it is error to attribute any part of that sentence to repeater status under § 939.63. Harris, 119 Wis.2d at 625. Relying on the § 939.62 to enhance a sentence within the statutory maximum is an abuse of discretion and a specific increase imposed for repeater status will be dropped from the sentence. Id. See also State v. Vinson, 183 Wis.2d 297, 313-15, 515 N.W.2d 314 (Ct. App. 1994).

However, a sentencing judge's mistaken reference to a defendant's status as a repeat offender will not automatically constitute an abuse of discretion. If the judge offers specific findings upon which the sentence was based and does not specifically state that the sentence is being enhanced due to the repeat offender statute, an abuse of discretion will not be found even if the judge mistakenly refers to the defendant as a repeat offender or if the judge correctly refers to the defendant as a repeat offender but imposes a sentence below the statutory maximum. Farr, 119 Wis.2d at 661-63.

A. Correctly Stating a Repeater Sentence

The factfinding for proof of prior convictions is to be done by the trial court. Block v. State, 41 Wis.2d 205, 211, 163 N.W.2d 196 (1968). If the court desires to impose a sentence greater than the regular statutory maximum, it must "make a finding that the

defendant is a repeater." State v. Harris, 119 Wis.2d 612, 619-20, 350 N.W.2d 633 (1984). The findings must specifically articulate the basis for the repeater status on the facts on record. Id.

Section 939.62(1) provides that if a person qualified as a repeater, maximum sentences are increased as follows:

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

- a maximum 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.

- a maximum of more than ten 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.

If the defendant's status as a repeater under § 939.62 has been properly alleged and proved, and if the sentencing court has concluded that a sentence in excess of the regular statutory maximum is appropriate, the sentence should be correctly stated on the record and reflected in the judgment of conviction. The court should state that the defendant's status as a repeater has been established, identify the increased sentence that § 939.62 allows, and then state the sentence that is being imposed. Again, the term of years imposed must be in excess of that authorized by the statutory maximum for the crime and within the increased penalty allowed by § 939.62. The court should not indicate that any particular portion of the sentence is attributed to the defendant's repeater status, but a statement to that effect will not constitute reversible error. See § 973.12(2) and State v. Upchurch, 101 Wis.2d 329, 335, 305 N.W.2d 57 (1981), cited in Harris, 119 Wis.2d 612, 625.

B. Multiple Counts; Consecutive or Concurrent Sentences

If a defendant is being sentenced for multiple counts and is a repeat offender, the sentence for all or any of the separate counts may be increased accordingly. Melby v. State, 70 Wis.2d 368, 384, 234 N.W.2d 634 (1975).

The imposition of consecutive sentences is not a condition to the use of an enhanced penalty under § 939.62, Stats. State v. Davis, 165 Wis.2d 78, 83, 477 N.W.2d 307 (Ct. App. 1991). The phrase "maximum term of imprisonment," as used in § 939.62, refers only to each individual crime and does not contemplate the total sentence for multiple count

convictions. Therefore, each count in a multiple count conviction may be enhanced under § 939.62, even if the individual sentences are imposed concurrently. Id.

C. Probation

The maximum term of probation is the maximum term of imprisonment for the crime. If the maximum term of imprisonment is increased under § 939.62(1), the maximum term of probation is increased accordingly. State v. Wicks, 168 Wis.2d 703, 706-07, 484 N.W.2d 378 (Ct. App. 1992).

D. Correcting an Improper Repeater Sentence

Section 973.13 provides that if a sentence is wrongly enhanced under § 939.62, (as by a failure to prove repeater status) the excess portion of the sentence will be void and the sentence commuted without further proceedings. This may be done either by an appellate court or by the trial court in a postconviction proceeding. Theriault, 187 Wis.2d at 133; Zimmerman, 185 Wis.2d at 559; State v. Holloway, 202 Wis.2d 694, 551 N.W.2d 841 (Ct. App. 1996).

If a trial court in a postconviction proceeding determines that the defendant's prior convictions were not properly proved, the court may correct the sentence by removing the excess portion and may also amend other portions of the sentence. Holloway, 202 Wis.2d at 698. Therefore, if a sentencing court is forced to correct the sentence under § 973.13, it may resentence the defendant "if the premise and goals of the prior sentence have been frustrated" by the need to commute the sentence. Id. at 700. In Holloway, the trial court reduced a sentence due to a failure to prove the defendant's prior convictions, but then altered the sentences from concurrent to consecutive. The court of appeals affirmed that the sentencing court acted lawfully.

V. Application to Specific Crimes

A. Attempt – § 939.32

The penalty for an attempt (of other than a Class A felony) is half the penalty allowed for the completed crime. § 939.32(1). Because § 939.62 is considered a penalty enhancer and not a crime in itself, it is not subject to the halving provisions of the attempt statute, § 939.32(1). Therefore, if a defendant who qualifies as a repeat offender is convicted of an attempt, the "maximum penalty for the underlying crime is halved and then that penalty may be enhanced under § 939.62." State v. Bush, 185 Wis.2d 716, 725 26, 519 N.W.2d 645 (Ct. App. 1994).

B. Controlled Substance Offenses – § 961.48

Section 961.48 provides for enhanced penalties for second or subsequent offenses under Chapter 961. It fulfills the same legislative purpose as does § 939.62. State v. Ray, 166 Wis.2d 855, 872, 481 N.W.2d 288 (Ct. App. 1992). Therefore, if a defendant is eligible for penalty enhancement under both § 961.48 and § 939.62, the sentence may be enhanced under either section but not under both. Id. at 873.

C. Contempt of Court – Punitive Sanction – § 785.04

Contempt of court for which a punitive sanction is imposed under § 785.04 is not a crime, and therefore, is not subject to the penalty-enhancing provisions of § 939.62. State v. Carpenter, 179 Wis.2d 838, 842-43, 508 N.W.2d 69 (Ct. App. 1993) applying McGee v. Racine County Circuit Court, 150 Wis.2d 178, 441 N.W.2d 308 (Ct. App. 1989).

D. Possession of a Firearm by a Felon – § 941.29

Section 941.29 states that "any person previously convicted of a felony who possesses a firearm is guilty of a Class E felony." This statute does not create a "penalty enhancer" but rather creates a distinct crime. State v. Jones, 142 Wis.2d 570, 576, 419 N.W.2d 263 (Ct. App. 1987). Therefore, the two year maximum penalty applicable to violations of § 941.29 may be enhanced under § 939.62. Id.

E. Use of a Dangerous Weapon – § 939.63

Section 939.63 states that the maximum term of imprisonment for a crime may be increased if "a person commits a crime while possessing, using or threatening to use a dangerous weapon." Sections 939.62 and 939.63 may both be used to enhance the maximum term of imprisonment for a single crime. State v. Pernell, 165 Wis.2d 651, 658, 478 N.W.2d 297 (Ct. App. 1991). If the sentencing court wishes to use both § 939.62 and § 939.63 to increase the maximum term of imprisonment for a single crime, § 939.63 must be applied first. The amount of enhancement available under § 939.62 should then be determined (based on the maximum term of imprisonment for the underlying crime plus the amount already enhanced under § 939.63). Id. at 658 59.

COMMENT

SM-35 was approved by the Committee in February 1998 and revised in 2022. This revision was approved by the Committee in October 2023; it corrected a statutory error to align with the most up-to-date language.

1. The text of subs. (1), (2), and (3) of § 939.62 follow. As to sub. (2m), see note 2, below.

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

[NOTE: Sub. (2m) is not included.]

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

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

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

2. Section 939.62(2m) contains what is commonly referred to as the "three strikes" provision. The formal title is "persistent repeater."

3. Repeater statutes are proliferating. The following provide increased penalties for repeated commission of specific crimes and are not addressed in this Special Material.

- § 939.621 Increased Penalty for Certain Domestic Abuse Offenses: provides a penalty increase of up to 2 years for domestic abuse offenses committed within 72 hours of arrest for a domestic abuse offense.

- § 939.626 Increased Penalty; Repeat Child Sex Crimes: provides a 10 year penalty increase for a second violation of §§ 948.02, 948.05, 948.06, 948.07, or 948.08.

Several other statutes refer to an "increased penalty" in their titles, but in fact provide for a minimum sentence, not an increase of the maximum. See, for example, § 939.623 Increased Penalty; Repeat Serious Sex Crimes [five-year minimum sentence]; § 939.624 Increased Penalty; Repeat Serious Violent Crimes [five-year minimum sentence]; § 939.635 Penalties; Assault Or Battery In Secured Juvenile Correctional Facility [five-year minimum sentence].

Finally, there is a series of statutes providing for a penalty increase where a crime is committed under certain circumstances: while armed with a dangerous weapon; while identity is concealed; etc. These have the effect of creating an additional element of the crime and most are addressed by jury instructions presenting the additional fact as a special question for the jury:

- § 939.625 Gang Crime Penalty Enhancer: provides a penalty increase of 5 years for gang-related criminal activity [see Wis JI-Criminal 985].

- § 939.63 Penalties; Use Of A Dangerous Weapon: provides for penalty increases if a person commits a crime while possessing or using a dangerous weapon [see Wis JI-Criminal 990].

- § 939.632 Penalties; Violent Crime in a School Zone: provides a 5-year penalty increase for certain "violent crimes" that are felonies and a 6 month penalty increase for certain "violent crimes" that are misdemeanors (changing their status from a misdemeanor to a felony). There is no jury instruction.

- § 939.64 Penalties; Use of Bulletproof Garment: provides a 5 year penalty increase for felonies committed while wearing a bulletproof garment [see Wis JI-Criminal 993].

- § 939.641 Penalties; Concealing Identity: provides a 5 year penalty increase for felonies committed while identity is concealed; increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 994].

- § 939.645 Penalties; Crimes Committed Against Certain People or Property: this is the so-called Hate Crimes Law; it provides a 5 year penalty increase for felonies and increases the maximum sentence to one year in jail for misdemeanors [see Wis JI-Criminal 996, 996.1].

- § 939.648 Penalty; Terrorism: provides a 10 year penalty increase for crimes involving "terrorism." There is no jury instruction.

- § 939.646 Penalty; Crimes Committed Using Information Obtained From The Sex Offender

Registry: provides for a 6 month increase on misdemeanors and a 5 year increase for felonies if the crime was committed using information obtained from the sex offender registry under § 301.46. There is no jury instruction.

- § 939.648 Penalty; Terrorism: provides a 10 year penalty increase for crimes involving "terrorism."

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48]. See the discussion at sec. V., B., this Special Material.

4. For discussion of misdemeanor expunction under § 973.015, see SM 36, Misdemeanors; Special Disposition Under Section 973.015.

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