411 PARTY TO CRIME: CONSPIRACY: THE CRIME CHARGED IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE INTENDED CRIME

Party to a Crime

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) as a member of a conspiracy to commit that crime.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of the crime. A member of a conspiracy is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was a member of a conspiracy to commit the crime of (name intended crime), that (name charged crime) was committed in the pursuance of (intended crime), and that under the circumstances, (name charged crime) was a natural and probable consequence of the (name intended crime).

Definition of Being A Member of a Conspiracy

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime.[2] A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.[3]

[IF WITHDRAWAL IS AN ISSUE, INSERT WIS JI-CRIMINAL 412.]

First consider whether the defendant was a member of a conspiracy to commit the crime of (name intended crime).

Statutory Definition of the Intended Crime

(Name intended crime), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the intended crime).[4]

State's Burden of Proof – Intended Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[5] elements of (name intended crime) were present.

Elements of the Intended Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE INTENDED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "MEMBER OF THE CONSPIRACY" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION.[6]

Next consider whether the crime of (name charged crime) was committed.

Statutory Definition of the Charged Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state elements of the crime).[7]

State's Burden of Proof – Charged Crime

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[8] elements of (name crime charged) were present.

Elements of the Charged Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "MEMBER OF THE CONSPIRACY" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION.[9]

Natural and Probable Consequences

Finally, consider whether (name charged crime) was committed in pursuance[10] of (name intended crime) and under the circumstances was a natural and probable consequence of (name intended crime) .[11]

A crime is a natural and probable consequence of another crime if, in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or if a reasonable person in the defendant's position would have known, that the crime of (name charged crime) was likely to result from the commission of (name intended crime) , then you may find that under the circumstances (name charged crime) was a natural and probable consequence of (name intended crime) .

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant was a member of a conspiracy to commit (name crime charged) , that a member of the conspiracy committed the crime of (name charged crime) [and that the defendant did not withdraw before the crime was committed],[12] that (name charged crime) was committed in pursuance of (name charged crime) and was, under the circumstances, a natural and probable consequence of committing (name intended crime) you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 411 was originally published in 1994. A nonsubstantive editorial correction was made in 1996. This revision was approved by the Committee in April 2005, and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400, © 1962, provided a single model that included all the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

This instruction is intended for the case where the defendant is alleged to be guilty as a party to a crime on the theory that the defendant was a member of a conspiracy to commit a crime, of which the charged crime is a natural and probable consequence. See §939.05(2)(c).

For an example applying a similar model (involving aiding and abetting and natural and probable consequences) to a case with first degree intentional homicide as a natural and probable consequence of armed robbery, see Wis JI-Criminal 406 EXAMPLE.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The description of a "member of a conspiracy" is based on the statement in § 939.31 which defines the inchoate crime of conspiracy. The conduct and agreement are the same in both situations. The only distinction is whether the crime is actually committed.

A person cannot be convicted under both § 939.31 for conspiracy and under § 939.05 as a party to a crime which is the objective of a conspiracy. § 939.72.

3. There is a question in the law of conspiracy whether a person must have sufficient interest in the outcome to amount to a "stake in the venture." While such a requirement was cited with approval in State v. Nutley, 24 Wis.2d 527, 556, 129 N.W.2d 155 (1964), later decisions have concluded that a "stake in the venture" is not required. The leading cases are discussed briefly here.

In United States v. Falcone, 109 F.2d 579 (CCA2d, 1940), the defendant was a wholesaler who sold large quantities of sugar and 5-gallon cans to grocers who sold them to bootleggers. Quantities greatly increased when illegal stills were active. The court held there was no conspiracy:

> There are indeed instances of criminal liability of the same kind [as civil liability], where the law imposes punishment merely because the accused did not forbear to do that which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.

In Direct Sales Co. v. United States, 319 U.S. 703 (1943), the defendant was a wholesale drug distributor who sold great quantities of morphine through the mail to a doctor in a small town. Sales were so large and frequent that Direct Sales must have known that the drugs could not be legally dispensed. The court held that a conspiracy was established. The key distinction between his case and Falcone lies in the nature of the commodities: the morphine was incapable of further legal use except by compliance with rigid regulations.

> This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote, and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.

> When the evidence discloses such a system, . . . there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy.

319 U.S. 703, 713.

The issue was addressed by the Wisconsin Supreme Court in State v. Hecht, 116 Wis.2d 605, 342 N.W.2d 721 (1984). Hecht had acted as the middleman between the buyer and the seller of cocaine. The court found the evidence sufficient to establish liability as either an aider and abettor or a conspirator. As to the conspiracy theory, the court cited Nutley for the two elements:

> (1) An agreement among two or more persons to direct their conduct toward the realization of a criminal objective.
>
> (2) Each member of the conspiracy must individually consciously intend the realization of the particular criminal objective. Each must have an individual 'stake in the venture.'

The court found the evidence sufficient to show a tacit agreement to sell cocaine and an intent on Hecht's part that the actual sale be accomplished. As to "stake in the venture," the court observed:

> The defendant argues strenuously that he had no "stake in the venture." However, while evidence of such a "stake" may be persuasive of the degree of the party's involvement, lack of a "stake in the venture" does not absolve one of party to a crime liability. Krueger v. State, 84 Wis.2d 272, 286, 267 N.W.2d 602 (1978). It is not a third element to either of the theories of aiding and abetting liability or conspiracy. As we have stated above, we find the defendant's participation to such a degree as to support a finding of guilt under either theory, regardless of the presence or absence of such a stake. However, it is clear to this court that Hecht did believe that he had a "stake in the venture." . . .
>
> We believe that Hecht's testimony concerning his belief of a "stake" further supports the jury's finding that he consciously intended the sale, to ensure his collection of the $1,700, and is also indicative of his advanced degree of involvement in the entire venture.

4. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

5. Insert the appropriate number of elements from the uniform instruction for the crime charged.

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of a member of the conspiracy directly committing the crime rather than to use "the defendant." In the party to crime case, it is the other person who directly commits the crime. Thus, the phrase, "a member of the conspiracy," should be used in place of "the defendant."

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10. "In pursuance of" is taken directly from § 939.05(2)(c). It is defined as "a carrying out or putting into effect." American Heritage Dictionary of the English Language, Third Edition, 1992. Thus, the charged crime must be committed "in the carrying out of" the intended crime.

11. The Committee concluded that whether one crime is a "natural and probable consequence" of another is an issue of fact to be determined by reference to the circumstances of each case. This is consistent with the approach of the Wisconsin Supreme Court in State v. Ivy, 119 Wis.2d 591, 350 N.W.2d 622 (1984) (reversing 115 Wis.2d 645, 341 N.W.2d 408 (Ct. App. 1983)). Neither Ivy nor the other decisions dealing with the "natural and probable consequences" theory provide a definition of that term. The definition in the instruction was developed after extensive deliberation and review. It equates "natural and probable consequences" with foreseeability, evaluated from the point of view of one in the defendant's position at the time of the alleged offense. This type of definition is consistent with the use of the term in tort law:

> Natural and probable consequences. To some extent there are difficulties of language. Many courts have said that the defendant is liable only if the harm suffered is the "natural and probable" consequence of his act. These words frequently appear to have been given no more definite meaning than "proximate" itself. Strictly speaking, all consequences are "natural" which occur through the operation of forces of nature, without human intervention. But the word, as used, obviously appears not to be intended to mean this at all, but to refer to consequences which are normal, not extraordinary, not surprising in the light of ordinary experience. "Probable," if it is to add anything to this, must refer to consequences which were to be anticipated at the time of the defendant's conduct. The phrase therefore appears to come out as the equivalent of the test of foreseeability, of consequences within the scope of the original risk, so that the likelihood of their occurrence was a factor in making the defendant negligent in the first instance.

Prosser, The Law of Torts, 4th ed., p. 252 (West 1971).

If foreseeability is required in the context of negligence, the Committee reasoned that its equivalent, at a minimum, must be applicable in criminal cases employing the "natural and probable consequence" theory.

12. The material in brackets should be added if the jury was instructed on withdrawal from a conspiracy. See § 939.05(2)(c) and Wis JI-Criminal 412.

