1497 FRAUDULENT USE OF A FINANCIAL TRANSACTION CARD — § 943.41(5)(a)1.a.

Statutory Definition of the Crime

Fraudulent use of a financial transaction card, as defined in § 943.41(5)(a) of the Criminal Code of Wisconsin, is committed by one who, with intent to defraud another,[1] uses a financial transaction card that is stolen[2] for the purpose of obtaining money, goods, services, or anything else of value.

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 used a financial transaction card.[3]

   A "financial transaction card" is an instrument or device issued by a business organization or financial institution for the use of the cardholder in (obtaining anything on credit) (certifying or guaranteeing the availability of funds sufficient to honor a draft or check) (gaining access to an account).[4]

2. The card was stolen.[5]

   [A "stolen" card is one that has been intentionally taken from its owner without consent and with intent permanently to deprive the owner of its possession.][6]

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3. The defendant used the card for the purpose of obtaining (money) (goods) (service) (anything of value).

   [Actual possession of the card is not required.][7]

4. The defendant acted with intent to defraud another.

   "Another" includes the issuer of the card or any person or organization providing money, goods, services, or anything else of value.[8]

   "Intent to defraud" is an intent to obtain something of value by deception or representation known to be false.[9]

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 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 A FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE WAS MORE THAN THE AMOUNT STATED IN THE QUESTION.[10]

[Determining Value]

[If you find the defendant guilty, answer the following question:

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("Was the value of the (money) (goods) (service) (_______) obtained more than $10,000?" Answer: "yes" or "no.")

("Was the value of the (money) (goods) (service) (_______) obtained more than $5,000?" Answer: "yes" or "no.")

("Was the value of the (money) (goods) (service) (_______) obtained more than $2,500?" Answer: "yes" or "no.")

"Value" means the amount of the transaction(s).

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."].

COMMENT

Wis JI-Criminal 1497 was originally published in 1989 and revised in 1991. This revision was approved by the Committee in February 2003; it limited the instruction to violations of sub. (5)(a)1.a., adopted a new format, made nonsubstantive changes in the text, and reflected the penalty changes made by 2001 Wisconsin Act 109.

In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself. Conduct of that type might be a better fit under § 943.41(5)(a)1.b. C See Wis JI-Criminal 1497A.

1. The full statement in the statute is "intent to defraud the issuer, a person or organization providing money, goods or services or anything else of value or any other person." The general term "another" is used in the initial statement of the offense in the opening paragraph but all possible targets of the intent to defraud are included in the third element.

2. The statute defines many different types of fraudulent use. This instruction addresses what the Committee believed to be one of the most common situations C the use of a stolen card. It is based on that part of the statute which refers to a card "obtained or retained in violation of sub. (3)." The reference to "sub. (3)" is to subsection (3) of § 943.41 which defines the offense of "theft by taking card." See Wis JI-Criminal 1496 and note 5, below.

If the case involves the use of a card other than a stolen card, use a different characterization wherever the word "stolen" appears. Other alternatives would include, for example, a forged card, a

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revoked card, or an expired card (see § 943.41(5)(a)), or a card otherwise "acquired in violation of sub. (3)," see note 5, below.

3. In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself. Thus, the defendant did not "use" the card as required by this element. Conduct of that type might be a better fit under § 943.41(5)(a)1.b. – See Wis JI-Criminal 1497A.

4. The definition of "financial transaction card" is based on the one provided in § 943.41(1)(em).

5. See note 2, supra. In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself. Thus, the card was not "stolen" as required by this element. Conduct of that type might be a better fit under § 943.41(5)(a)1.b. – See Wis JI-Criminal 1497A.

6. The definition of "stolen" is based on the facts necessary to constitute theft under § 943.20(1)(a): an intentional taking, without consent, and with intent to deprive the owner permanently of possession. Use of a stolen card, with "stolen" defined in this manner, would constitute "use of a card obtained in violation of sub. (3)" as prohibited by § 943.41(5). See note 2, supra. However, a card could be "obtained in violation of sub. (3)" without having been obtained in a way that would make the card a "stolen" card under this definition. See Wis JI-Criminal 1496.

7. In State v. Shea, 221 Wis.2d 418, 585 N.W.2d 662 (Ct. App. 1998), the court held that § 943.41(5)(a)1.a. could be applied to a case where the defendant used a credit card number without authorization but did not have possession of the card itself.

8. This statement presents the alternative targets of the intent to defraud as set forth in § 943.41(5). See note 1, supra.

9. The definition of "intent to defraud" is based on those provided in other instructions, tailored for this defense. See, for example, Wis JI-Criminal 1405 and 1470.

10. By analogy to theft cases, the Committee concluded that the jury must make a finding of the value of the claim if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Regarding theft cases, see Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.

The amounts determining the penalty were changed twice during the 2000-2001 legislative session. The amount making the offense a felony was increased to $2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. The penalty structure was revised again by 2001 Wisconsin Act 109 [effective date: February 1, 2003]. The revised penalties, determined by reference to a single transaction or separate transactions within a period of 6 months, are as follows:

- if the value of goods, etc., obtained exceeds $2,500 but not $5,000, the offense is a Class I felony;

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- if the value of goods, etc., obtained exceeds $5,000 but not $10,000, the offense is a Class H felony; and,
- if the value of goods, etc., obtained exceeds $10,000, the offense is a Class G felony.

The questions in the instruction omits the upper limits of the categories for Class I and Class H felonies; it is no defense that the value was actually greater than the amount alleged. More than one question may be presented to the jury, however. If the evidence would allow a reasonable jury to find, for example, that the value did not exceed $10,000 but did exceed $5,000, the two relevant questions could be submitted.

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