2661 OPERATING A VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION AND CAUSING INJURY — 0.08 GRAMS OR MORE — § 346.63(2)(a)2.

Statutory Definition of the Crime

Section 346.63(2)(a) of the Wisconsin Statutes is violated by one who causes injury to another by the operation of a vehicle[1] on a highway[2] while that person has a prohibited alcohol concentration.[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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated a vehicle[4] on a highway.[5]

   "Operate" means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.[6]

2. The defendant's operation of a vehicle caused injury[7] to (name of victim).

   "Cause" means that the defendant's operation of a vehicle was a substantial factor[8] in producing the injury.

3. The defendant had a prohibited alcohol concentration at the time the defendant operated a vehicle.

Definition of "Prohibited Alcohol Concentration"

"Prohibited alcohol concentration" means[9]

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

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 operating a vehicle is evidence of the defendant's alcohol concentration at the time of the operating.[10]

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED[11] AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"[12] 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 had a prohibited alcohol concentration at the time of the alleged 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 prohibited alcohol concentration at the time of the alleged operating, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:[13]

[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 346.63(2)(b), USE THE FOLLOWING CLOSING:[14]

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 346.63(2)(b), USE THE FOLLOWING CLOSING:[15]

[Consider Whether the Defense is Proved]

[Wisconsin law provides that it is a defense to this crime if the injury would have occurred even if the defendant had been exercising due care and had not had a prohibited alcohol concentration.

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[16] that this defense is established.

"By the greater weight of the evidence" is meant 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.[17]

[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[18] does not by itself provide a defense to the crime charged against the defendant.[19] Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the injury would have occurred even if the defendant had not had a prohibited alcohol concentration 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.[20]].

COMMENT

Wis JI-Criminal 2661 was originally published in 1982 and revised in 1985, 2004, 2006, and 2015. This revision was approved by the Committee in August 2017; it added footnote 7.

This instruction is drafted for violations of § 346.63(2)(a)2. involving a prohibited alcohol concentration [PAC] of .08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. For persons with three or more priors, the PAC level is .02.

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 2665 for the related offense of causing injury while operating under the influence, as defined in § 346.63(2)(a)1. For cases involving two charges – operating under the influence and with a PAC – Wis JI-Criminal 1189 can be used as a model.

Section 346.65(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 15 and following. The defense was formerly addressed in a separate instruction, Wis JI-Criminal 2662, which has been withdrawn. 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.

The penalty for violations of § 346.62(2)(a) doubles if a child was in the vehicle at the time of the offense. See § 346.65(3m) and Wis JI-Criminal 999. A similar provision in the Criminal Code was repealed by 2001 Wisconsin Act 109 and recreated as a sentencing factor, but § 346.65(3m) was not affected.

In State v. Smits, 2001 WI App 45, 241 Wis.2d 374, 626 N.W.2d 42, the court held that operating while intoxicated offenses are not lesser included offenses of the "causing injury" offenses defined in § 346.63(2).

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 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. Note that § 346.63(2)(a) uses the phrase "operation of a vehicle." This differs in two respects from the way other offenses under § 346.63 are defined. First, it refers to "operate," not "drive or operate." Second, it refers to "vehicle" not "motor vehicle." The Committee assumed that these differences were intentional on the part of the legislature. The use of "vehicle" may be justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct – namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

2. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

3. See Wis JI-Criminal 2600 Introductory Comment, Sec. V., regarding the amendment of the definition of "prohibited alcohol concentration" by 2003 Wisconsin Act 30 [effective date: September 30, 2003].

The instruction refers to "prohibited alcohol concentration" in the introductory paragraph and in the general statement of the second element. It then provides for using the appropriate measure of alcohol

concentration – blood alcohol or alcohol in the breath – in the definition of the second element. For cases involving the 0.02 level, see Wis JI-Criminal 2660C.

4. See note 1, supra. Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

5. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I, and Wis JI-Criminal 2605.

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

7. "Injury" was undefined by statute until 2013 Wisconsin Act 224 [effective date: April 10, 2014] created § 346.63(2)(c) to define it as "substantial bodily harm," cross-referencing the definition of that term in § 939.22(38). Section 346.63(2)(c) was repealed by 2015 Wisconsin Act 371 [effective date: April 27, 2016], again leaving "injury" undefined. The version of this instruction published before the 2014 statutory change did not define injury, but included the footnote that follows. There have been no directly applicable developments since then.

> The instruction does not define "injury" because it is not defined in the statutes or by a published court decision. While the Criminal Code uses the closely related term "bodily harm," caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, regarding whether "pain" is sufficient to constitute "injury." In a prosecution under § 346.63(2)(a), the court held that the word "injury" encompasses physical pain. State v. Maddox, No. 03-0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] However, in a prosecution under § 940.225(2)(b), where "injury" is also used, the court held that the trial court erred in defining "injury" using the Criminal Code definition of "bodily harm" [see § 939.22(4)] because "injury" does not include "pain." State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating "injury" with "bodily harm." [Originally published as footnote 8, Wis JI-Criminal 2661 © 2006.]

8. 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 injury. 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 14, 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 injury as required by the second element. If the defendant's operation caused the injury, the defense allows the defendant to avoid liability if it is established that the injury would have occurred even if the defendant had not been under the

influence and had been exercising due care. The constitutionality of eliminating causal negligence as an element of § 940.09 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.

9. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600, Introductory Comment, Sec. V.

10. 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.

11. Regarding instructions on test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

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

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2690 Introductory Comment, Sec. VII.

14. Section 346.63(2)(b) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the injury would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." 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.

15. See note 14, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.

16. Section 346.65(2)(b) 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."

17. 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.

18. 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.

19. 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 § 346.63(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 17, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

20. This statement is included to assure 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.

